

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
	1. <i>Assignments of Error</i>	1
	2. <i>Issues Pertaining to Assignments of Error</i>	2
B.	STATEMENT OF THE CASE	3
	1. <i>Introduction.</i>	3
	2. <i>Statement of Facts</i>	4
C.	SUMMARY OF APPELLANT'S ARGUMENT	10
D.	ARGUMENT	13
	1. <i>Standard of Review</i>	13
	2. <i>No Breach of Contract</i>	14
	3. <i>Washington Consumer Protection Act Claim</i>	18
	4. <i>Federal Preemption Analysis</i>	26
E.	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Alpine Indus., Inc. v. Gohl</i> , 30 Wn.App. 750, 637 P.2d 998 (1981)	16
<i>American Bankers Association v. Lockyer</i> , 239 F.Supp. 2d 1000, 1007 (E.D. Cal. 2002)	28-31
<i>Badgett v. Sec. State Bank</i> , 116 Wn.2d 563, 569, 807 P.2d 356 (1991)	17, 18
<i>Bank of America v. City and County of San Francisco</i> , 309 F.3d 551, 558 (9th Cir. 2002)	27, 28
<i>Barnett Bank v. Nelson</i> , 517 U.S. 25, 32, 134 L.Ed.2d 237, 116 S.Ct. 1103 (1996)	27
<i>Blake v. Federal Way Cycle Center</i> , 40 Wn.App. 302, 309, 698 P.2d 578 (1985)	14
<i>Bogle & Gates, P.L.L.C. v. Zapel</i> , 121 Wn.App. 444, 448, 90 P.3d 703 (2004)	13
<i>Bordeaux, Inc. v. Am. Safety Ins. Co.</i> , 145 Wn.App. 687, 693-94, 186 P.3d 1188 (2008)	13
<i>Capelouto v. Valley Forge Insurance Co.</i> , 98 Wn.App. 7, 11, 990 P.2d 414 (1999)	25
<i>Christensen v. Harris County</i> , 529 U.S. 576, 587 (2000)	33
<i>Dwyer v. JI Kislak Mortgage Corp.</i> , 103 Wn.App. 542, 13 P.2d 240 (2000)	22-25

<i>Elliot Bay Seafoods, Inc. v. Port of Seattle</i> , 124 Wn.App. 5, 12, 98 P.3d 491 (2004)	16
<i>Fisher v. World Wide Trophy Outfitters</i> , 15 Wn.App. 742, 743-44, 551 P.2d 1398 (1976)	13
<i>Fultz v. World Savings & Loan Assoc.</i> , 571 F.Supp.2d 1195 (W.D. Wa. 2008)	33
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 780, 719 P.2d 531. (1986)	21
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997)	21
<i>Hutson v. Wenatchee Fed. Sav. & Loan Ass'n.</i> , 22 Wn.App. 91, 588 P.2d 1192 (1978)	17
<i>Johnson v. Yousoofian</i> , 84 Wn.App. 755, 762, 930 P.2d 921 (1996)	17
<i>Keyes v. Bollinger</i> , 31 Wn.App. at 289	13
<i>Larsen v. Union Inv. & Loan Co.</i> , 168 Wash. 5, 10 P.2d 557 (1932)	16
<i>Liebergessel v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980) . . .	17
<i>McCurry v. Chevy Chase Bank, FSB</i> , 169 Wn.2d 96, 233 P.3d 861 (2010)	26, 36, 38, 39
<i>Metro. Park Dist. v. Griffith</i> , 106 Wn.2d 425, 437, 723 P.2d 1093 (1986)	17
<i>Miller v. U.S. Bank of Washington</i> , 72 Wn.App. 416, 426 n. 5, 865 P.2d 536 (1994)	17
<i>Moskowitz v. Washington Mutual Bank, FA</i> , 329 Ill.App.3d 144, 148, 768 N.E.2d 262 (2002)	39

<i>Northwest Mfrs. v. Dept. of Labor & Industries</i> , 78 Wn.App. 707, 712, 899 P.2d 6 (1992)	16
<i>Perry v. Island Savings & Loan Association</i> , 101 Wn.2d 795, 684 P.2d 1281 (1984)	25
<i>Suarez v. Newquist</i> , 70 Wn.App. 827, 855 P.2d 1200 (1993)	21
<i>Tokarz v. Frontier Fed. Sav. & Loan Ass'n.</i> , 33 Wn.App. 456, 656 P.2d 1089 (1982)	17
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)	13

Statutes

Consumer Protection Act of Washington, RCW 19.86	1-4, 7-13, 18-19, 21-22, 24-25, 27, 31, 33, 34, 37, 40
Federal Credit Union Act, 12 USC §1751, <i>et seq</i> (see attached Appendix)	4, 8-9, 27-30, 31, 34
Real Estate Settlement and Procedures Act (RESPA), 12 USC §2605, <i>et seq.</i>	3, 7, 8

Other Authorities

<i>Black's Law Dictionary</i> , 4th Ed. (1951)	18
National Credit Union Administration (NCUA) regulations, 12 C.F.R. §§ 700 <i>et seq</i> (see attached Appendix)	9, 27, 29-36, 38-39
National Credit Union Administrative Rule, 49 Fed.Reg. 30683 (see attached Appendix).	35

A. ASSIGNMENTS OF ERROR

1. *Assignments of Error*

(a) The trial court erred in reversing its original summary judgment ruling which correctly dismissed plaintiff's Consumer Protection Act claim, and reconsidering and reversing that original ruling.

(b) The trial court erred in reinstating plaintiff's Consumer Protection Act claim while dismissing all other claims and causes of action.

(c) The trial court erred in granting plaintiff's Motion for Summary Judgment on the Consumer Protection Act claim.

(d) The trial court erred in granting plaintiff's Motion for Summary Judgment on the Consumer Protection Act claim because of genuine issues of material fact precluding summary judgment.

(e) The trial court erred in entering judgment in favor of plaintiff and plaintiff class.

2. *Issues Pertaining to Assignments of Error*

(a) Did the trial court correctly rule as a matter of law that plaintiff's causes of action for breach of contract and Consumer Protection Act violation should be dismissed?

(b) Should plaintiff's cause of action for breach of contract arising out of a Deed of Trust reconveyance fee be dismissed where the Deed of Trust expressly provides for a reconveyance fee to the lender?

(c) Should plaintiff's cause of action for violation of the Consumer Protection Act arising out of a Deed of Trust reconveyance fee be dismissed where the Deed of Trust expressly provides for reconveyance fees to the lender?

(d) Is it an unfair or deceptive act or practice violative of the Consumer Protection Act when a lender charges a reconveyance fee, expressly authorized by the Deed of Trust, but does not itemize the costs comprising the reconveyance fee and was the issue of whether the reconveyance fee charge was excessive or unreasonable a genuine issue of material fact present in the record?

(e) Does federal law preempt the Washington State Consumer Protection Act in a case where the plaintiff challenges the manner in which a reconveyance fee is charged when the reconveyance fee is expressly allowed by the Deed of Trust?

B. STATEMENT OF THE CASE

1. Introduction.

This is a class action lawsuit against a financial institution challenging a Deed of Trust reconveyance fee charged upon loan payoff. Causes of action for breach of contract, unjust enrichment, violation of the Consumer Protection Act and Real Estate Settlement and Procedures Act (RESPA), 12 USC §2605, *et seq.* were dismissed by summary judgment motion.

Prior to certification of a class, the trial court reconsidered its ruling dismissing the CPA claim. The court then granted plaintiff's motion for summary judgment on the CPA claim.

The court certified a class and awarded the class damages in the principal sum of \$33,384 and attorney's fees and costs in the sum of \$214,935.

Defendant appeals the trial court's reinstatement of the CPA claim, the finding of liability on the part of defendant determined on summary judgment and the monetary relief awarded.

2. Statement of Facts

Appellant, Kitsap Community Federal Credit Union (hereafter "KCU") was at all times relevant a federally chartered credit union pursuant to the Federal Credit Union Act, 12 USC §1751, *et seq.* Appellant serves more than 70,000 credit union members throughout the greater Kitsap Peninsula and beyond. (CP 91-92.)

Respondent, Joanne Peterson, was a member of KCU and borrowed money from the Credit Union through a home equity line of credit. Peterson offered her residential real property as security for the credit line. (CP 198-199.)

Respondent executed a Deed of Trust against her residential real property to secure the payment of all sums advanced on the credit line. Paragraph 18 of the Deed of Trust states as follows:

18. Reconveyance. Upon payment of all sums secured by this Security Instrument and termination of Borrower's ability to obtain further advances under the Agreement, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and the Agreement evidencing debt secured by this Security Instrument to Trustee. Trustee shall

reconvey the Property without warranty to the person or persons legally entitled to it. *Such person or persons shall pay any recordation costs and, as permitted by law, shall pay lender a reconveyance fee.* (CP 196.) (Emphasis added.)

Thereafter, Peterson authorized and instructed KCU to accept payoff in full of the credit line loan from Land Title Escrow and to close the account. She requested that documents necessary for reconveyance be provided to Land Title Escrow along with reconveyance documents. (CP 205-206.) KCU staff reviewed Peterson's account information, computed the loan payoff and per diem and prepared and transmitted a payoff statement. The payoff statement listed principal and interest due on the loan and a "Release Fee" (Reconveyance) in the sum of \$85.00 pursuant to Paragraph 18 of the Deed of Trust. (CP 190-203.)

Upon receipt of loan payoff sums, KCU provided information pertaining to the Deed of Trust to Trustee Services, Inc. which processed the reconveyance as agent of the Credit Union. A Full Reconveyance (CP 201) was recorded releasing the Credit Union's interest in the real property securing the loan. The reconveyance fee of \$85.00 received by KCU included the following: \$32.00 recording fee as reflected on the Full Reconveyance; \$27.00 administrative fee

charged by Trustee Services, Inc.; the balance of \$26.00 was the administrative fee retained by KCU. (CP 190.)

Preparing loan payoff information is only a portion of the loan payoff/reconveyance process. As stated in the Full Reconveyance (CP 201) Trustee Services, Inc. receives a written request to reconvey from the Deed of Trust beneficiary, KCU. After the loan payoff is received, the Credit Union contacts Trustee Services, Inc. and provides a written (email) Request for Full Reconveyance. After the request is transmitted to Trustee Services, Inc., KCU receives a confirmation sheet and begins a tracking process to make sure that the reconveyance is promptly completed. Periodically, the Credit Union checks the county website to make sure the reconveyance has been promptly recorded by Trustee Services, Inc. (CP 749-757.)

Peterson's lawsuit challenges the \$85.00 reconveyance fee claiming KCU retained \$26.00 for its own "profit" (CP 242-245) and was only required to expend \$59 to release and reconvey. Further, KCU never advised Peterson or other class members that KCU was "marking up the costs of release and reconveyance." (CP 248, First Amended Complaint, Paragraph 13.)

Peterson's lawsuit claims the imposition of \$26.00 of the \$85.00 reconveyance fee is a breach of the Deed of Trust contract; that KCU has been unjustly enriched by the charging and receipt of the fees; and KCU's practices constitute unfair and deceptive acts and practices violative of the Consumer Protection Act of Washington (CPA or WCPA), RCW 19.86. Further, Peterson sought declaratory relief and a determination that KCU violated RESPA. (CP 251-254.)

Upon KCU's motion for summary judgment of dismissal of all claims, the trial court issued a Memorandum Opinion (CP 231-233) concluding that reconveyance fee charges are not prohibited and as a matter of law can be charged. Therefore, there was no breach of contract and summary judgment on this basis was granted. In dismissing the claim of unjust enrichment, the court stated the "reconveyance fee was expressly addressed in Paragraph 18 of the Deed of Trust and is enforceable." (CP 232.) Given there is an express contract which is supported by consideration, there is no claim for unjust enrichment as a matter of law. In granting summary judgment, dismissing the WCPA claim, the court stated:

As the reconveyance fee charge was expressly provided for in the Deed of Trust there was no unfair or

deceptive act or practice established as a matter of law.
(CP 232.)

It is KCU's position in this appeal that the foregoing rulings by the trial court were correct. The Order Granting Defendant's Motion for Summary Judgment on April 17, 2008 (CP 236-237) was a correct ruling and should be reinstated.

Upon plaintiff's motion for reconsideration, the trial court ruled it would reconsider granting of summary judgment as to the WCPA claim only. (CP 258-259.) The court issued an order reinstating Peterson's CPA claim "related to the imposition by Kitsap Credit Union of the \$26.00 charge when Plaintiff paid off her loan. . ." (CP 288-289.)

Thereafter, KCU renewed its motion for summary judgment seeking dismissal of the WCPA claim as well as dismissal of plaintiff's RESPA claim (which had been added by Amended Complaint). Peterson agreed to dismissal of the RESPA claim. (CP 397-98.) KCU based its renewed motion for dismissal of the WCPA claim urging federal statutory preemption of Peterson's CPA claim. (CP 290-382.)

The trial court denied KCU's motion to dismiss the CPA claim (CP 397-398) and issued a Memorandum Opinion clarifying its decision. (CP 391-396.) In this appeal, KCU asserts the trial court erred in its preemption analysis. Peterson's CPA claim should be dismissed based upon preemption of the CPA by federal law, namely the Federal Credit Union Act and the National Credit Union Administration (NCUA) regulations. The reconveyance fee charged to Peterson was a loan-related fee governed by these federal authorities which expressly preempt any state law purporting to limit or affect the manner in which loan repayment fees are charged.

Thereafter, Peterson brought a motion for summary judgment asserting the \$26.00 portion of the \$85.00 reconveyance fee was "in excess of the actual expenses KCU incurred to obtain and record the Reconveyance" and therefore violated the CPA. (CP 463-477.)

The trial court granted plaintiff's motion without explanation by Memorandum Opinion dated December 18, 2009. (CP 760-761.)

In subsequent memorandum opinions on class certification and final judgment, the trial court provided some indication of its reasoning. In its Memorandum Opinion dated February 8, 2010 (CP 762-768) the court stated:

The Court in granting summary judgment on the WCPA claim, focused on the undisputed fact that the Release Fee (Reconveyance) included an undisclosed charge in addition to the fee to prepare the full reconveyance document and the Kitsap County Auditor's recording fee. (CP 765-766.)

In its Memorandum Opinion dated January 4, 2011 (CP 939-943) the trial court stated "Absent this lawsuit, the charging of the \$26.00 fee would have continued, as the hidden fee was deceptive and not discoverable within the loan documents." (CP 939.)

The court certified a class limited to those borrowers where the Deed of Trust form was the same or substantially similar to Peterson's Deed of Trust. (CP 766.) The class consists of 428 members. (CP 882.) Single damages in the sum of \$26.00 per member total \$11,128.00 for the entire class.

C. SUMMARY OF APPELLANT'S ARGUMENT

Upon payment of her loan, Peterson was contractually obligated by the Deed of Trust to "pay lender a reconveyance fee" in addition to recordation costs. (CP 196.) The contractual right of KCU as lender to charge a reconveyance fee cannot be challenged. The trial court correctly ruled there was no breach of contract in charging a reconveyance fee. (CP 232.) An \$85.00 reconveyance

fee was charged to Peterson. (CP 203.) No breakdown of the fee was provided in the payoff statement nor was an itemization of the fee required by the contract. Peterson has no objection to KCU charging its out-of-pocket expenses to Trustee Services, Inc. (\$59) for preparation and recording of the Full Reconveyance document upon loan payoff. The \$59.00 expense included a \$32.00 recording fee.

Included in the \$85.00 reconveyance fee was the sum of \$26.00 which Peterson persistently characterizes as "profit mark-up of the actual expense." (CP 465.)

The "lender," KCU, performed services as part of the reconveyance process. (CP 189-206; 749-757.) The reconveyance fee is a contractually allowable fee charged by KCU. It is incumbent upon Peterson to provide evidence that the fee has no relation to any services performed or is unreasonable or excessive. Peterson provides no evidence that KCU failed to perform services as part of the reconveyance process.

The trial court correctly ruled on KCU's initial motion for summary judgment that there was no unfair or deceptive act or practice violative of the WCPA since the reconveyance fee charged was expressly provided for in the Deed of Trust. It is a fact question

precluding summary judgment if Peterson claims the fee is excessive or unreasonable.

The imposition of a reasonable reconveyance fee cannot be an unfair practice under the CPA. An action done in good faith under an arguable interpretation of existing law is not "unfair" in the context of Consumer Protection law. The Credit Union's imposition of a reasonable reconveyance fee, which includes pass through and recording charges, is not deceptive as a matter of law. Peterson suffered no injury if in fact the \$85.00 reconveyance fee paid to the lender was a reasonable fee which she was contractually obligated to pay.

A reconveyance fee charged by a federal credit union to its member is a loan-related fee exclusively within the field of federal regulation. Peterson's CPA cause of action is preempted because it seeks to determine the manner and method a contractually allowed reconveyance fee can be charged. Recent case law in the banking context supports KCU's preemption analysis.

D. ARGUMENT

1. *Standard of Review*

Summary judgment orders are reviewed *de novo* and the appellate court engages in the same inquiry as the trial court. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn.App. 687, 693-94, 186 P.3d 1188 (2008); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The reviewing court considers the facts in the light most favorable to the non-moving party. Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (CR 56(c).) *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn.App. 444, 448, 90 P.3d 703 (2004).

The determination of whether a particular statute applies to a factual situation is a conclusion of law and not a finding of fact. See *Keyes v. Bollinger*, 31 Wn.App. at 289, quoting *Fisher v. World Wide Trophy Outfitters*, 15 Wn.App. 742, 743-44, 551 P.2d 1398 (1976). Consequently, whether particular actions rise to the stature of being "unfair" or "deceptive" under the WCPA is reviewable as a question

of law. *Blake v. Federal Way Cycle Center*, 40 Wn.App. 302, 309, 698 P.2d 578 (1985).

2. No Breach of Contract

The trial court correctly ruled there was no breach of contract by KCU in charging a reconveyance fee to Peterson. (CP 232.) The imposition of a reconveyance fee was expressly authorized by Paragraph 18 of the Deed of Trust. (CP 196.) Nonetheless, Peterson presents a cross appeal challenging the court's ruling in this regard. (CP 972-989.)

The specific language of the contract at issue states: "Such person or persons shall pay any recordation costs and, as permitted by law, shall pay lender a reconveyance fee." Peterson apparently has no issue with the contractual requirement that the Borrower pay "recordation costs" as part of the reconveyance process. Such recordation costs were included in the \$85.00 reconveyance fee charged to Peterson. (CP 190.) Similarly, Peterson does not challenge the \$27.00 portion of the \$85.00 reconveyance fee paid to Trustee Services, Inc. which processed the Full Reconveyance as agent of the Credit Union. (CP 190, 269-280.) The remaining \$26.00 retained by KCU is challenged by Peterson.

The quoted language from the Deed of Trust at Paragraph 18 is not ambiguous. Clearly the "lender" is entitled to a reconveyance fee as a matter of contract. Peterson ignores the testimony of Melinda Anthony, Vice President of Lending Services for KCU who provides testimony that actual services are performed by KCU as part of the reconveyance process. (CP 189-206, CP 749-757.)

In effect, Peterson acknowledges the contractual obligation to pay recordation costs and out-of-pocket expenses incurred by KCU in the reconveyance process. Peterson disputes any portion of the \$85.00 reconveyance fee retained by KCU despite the clear language in the Deed of Trust that Peterson "shall pay *lender* a reconveyance fee." (Emphasis added.)¹

In ignoring the clear contractual language, Peterson seeks to impose a duty on KCU to perform reconveyance services at no charge other than recordation costs and pass through expenses. Peterson does not challenge the reasonableness of the fees, including the \$26.00 fee portion retained by KCU. Rather, Peterson

¹ Since the contract itself provided that plaintiff would pay lender a reconveyance fee 'as permitted by law,' and the testimony of Melinda Anthony concerning the services KCU performed, the trial court could not have properly entered summary judgment. There existed an obvious and material issue of fact regarding whether the KCU reconveyance fee was excessive or unreasonable.

seeks to change the express terms of the Deed of Trust contract and impose a duty upon KCU to disclose the allocation of the \$85 reconveyance fee. Peterson has not cited a specific provision in the loan documents that requires KCU to disclose how the \$85.00 reconveyance fee is spent. The \$85.00 fee was fully disclosed to Peterson in writing during the loan payoff process. (CP 203.)

Under Washington law, there is no breach of contract when the alleged term that was breached is absent from the contract. *Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn.App. 5, 12, 98 P.3d 491 (2004). Following Peterson's logic, the pass through fee of \$27.00 paid to Trustee Services, Inc. could just as easily be subject to challenge by Peterson. Where is the duty, express or implied, to disclose allocation of the \$85.00 reconveyance fee?

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Mfrs. v. Dept. of Labor & Industries*, 78 Wn.App. 707, 712, 899 P.2d 6 (1992); *Larsen v. Union Inv. & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932); *Alpine Indus., Inc. v. Gohl*, 30 Wn.App. 750, 637 P.2d 998 (1981).

The general rule in Washington is that a lender is not a fiduciary of its borrower. *Tokarz v. Frontier Fed. Sav. & Loan Ass'n.*, 33 Wn.App. 456, 656 P.2d 1089 (1982); *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980); *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n.*, 22 Wn.App. 91, 588 P.2d 1192 (1978).

There is an implied duty of good faith and fair dealing in every contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). However, the "implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations." *Johnson v. Yousoofian*, 84 Wn.App. 755, 762, 930 P.2d 921 (1996); citing *Miller v. U.S. Bank of Washington*, 72 Wn.App. 416, 426 n. 5, 865 P.2d 536 (1994). In the present action, Peterson fails to show that KCU had specific contract obligations which would support Peterson's allegations of breach of contract. Therefore, without the specific obligation to disclose allocation of the reconveyance fee, there can be no breach of the implied duty of good faith and fair

dealing. Summary Judgment dismissing plaintiff's breach of contract claim was appropriate.

As the *Badgett* case, *supra* at p. 569, makes clear, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it inject substantive terms into the party's contract. Rather it requires only that the parties perform in good faith the obligations imposed by their agreement.

3. *Washington Consumer Protection Act Claim*

In reconsidering its ruling dismissing Peterson's WCPA claim, and later ruling in favor of Peterson on summary judgment, the trial court committed error. The trial court correctly ruled on the initial motion for summary judgment when it dismissed Peterson's claim under the WCPA. Peterson and the trial court would impose a duty on the lender to spell out each component of the reconveyance fee. This is not contractually required, is not a misrepresentation, and certainly is not unfair or deceptive where the total reconveyance fee of \$85.00 is disclosed. "Deception" is intentional misleading by falsehood, either spoken or acted. See *Black's Law Dictionary, 4th Ed.* (1951). The dismissal order should be reinstated. The court correctly ruled that:

As the reconveyance fee charged was expressly provided for in the Deed of Trust there was no unfair or deceptive act or practice established as a matter of law. Summary judgment is granted on this basis. (CP 232.)

The trial court provides little clarification in the record of this reversal of its own decision on this issue. In its Memorandum Opinion dated January 4, 2011 the court ruled "the hidden fee was deceptive and not discoverable within the loan documents" (CP 939.) Additionally, in its Memorandum Opinion dated February 8, 2010, the trial court explained it "focused on the undisputed fact that the Release Fee (Reconveyance) included an undisclosed charge in addition to the fee to prepare the Full Reconveyance document and the Kitsap County Auditor's recording fee."

The trial court appears to have accepted the creative position of Peterson that the \$26.00 portion of the \$85.00 reconveyance fee was an "undisclosed charge" which was "not discoverable" by Peterson in the loan documents. As such, Peterson alleges the \$26.00 portion of the reconveyance fee is an unfair or deceptive act or practice under the WCPA.

The language of Paragraph 18 of the Deed of Trust is clear and unambiguous. The reconveyance fee payable to the lender

(KCU) is an amount *in addition to* the recordation costs. KCU charged a total fee of \$85.00 including recordation costs. No breakdown of the reconveyance fee was provided nor required by the Deed of Trust. Adopting the logic of Peterson and the trial court, the recordation costs and fee paid to Trustee Services, Inc. were undisclosed and not discoverable within the loan documents. Yet Peterson does not claim these charges were deceptive. The trial court fails to explain how the \$26.00 portion of the reconveyance fee, is an unfair or deceptive act or practice as a matter of law. Peterson and the court ignore the evidence provided by KCU that KCU actually performed reconveyance services in addition to those provided by Trustee Services, Inc. as documented in the declarations of Melinda Anthony. (CP 189-206, 749-757.)

On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact. All reasonable inferences supported by the evidence are to be drawn in favor of the non-moving party. If a rational trier of fact might resolve the issues in favor of the non-moving party, summary judgment must

be denied. *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997); *Suarez v. Newquist*, 70 Wn.App. 827, 855 P.2d 1200 (1993).

Peterson's CPA claim fails as a matter of law. To prevail in a WCPA claim, a plaintiff must establish five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce, (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531. (1986). "A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." *Id.* at 785 (emphasis in original).

Given the unambiguous language in the Deed of Trust regarding reconveyance fees and Peterson's clear obligations under that instrument, Peterson's CPA claims fail. The charging of a reconveyance fee can be neither unfair nor deceptive when the Deed of Trust has no capacity to deceive borrowers as to KCU'S right to charge that fee. Section 18 of the Deed of Trust, quoted above, establishes that the borrower shall pay a reconveyance fee and any recordation costs to the lender. Similarly, it is neither unfair nor deceptive to condition reconveyance upon payment of the

reconveyance fee, in addition to other sums secured by the Deed of Trust such as principal and interest, because all are express obligations of the Deed of Trust. Such sums are required in conjunction with the lender requesting the trustee to reconvey the property to the borrower, which is conditioned "upon payment of all sums secured by this Security Instrument. . ."which includes the reconveyance fee. (CP 196.)

No Washington case discusses whether it violates the CPA for a lender to charge a reconveyance fee as a condition for releasing or reconveying title when that fee is expressly allowed in the Deed of Trust. There is a Washington case that is superficially on point, but upon closer examination it is evident that the case is distinguishable from the case before this Court and actually supports Kitsap Credit Union's position.

Dwyer v. JI Kislak Mortgage Corp., 103 Wn.App. 542, 13 P.2d 240 (2000) discusses whether a lender violated Washington's CPA using a payoff statement that appeared to condition the release of a borrower's mortgage upon payment of "unsecured" fees (in that case fees charged for faxing a payoff statement) in addition to the "secured" balance due on the mortgage. There was no reference to

these fees in the security instrument. The Court of Appeals did not define the terms "secured" and "unsecured" but held that the inclusion of the fax fees on the payoff statement was improper without an additional disclaimer that the fax fees need not be included with the payment of the secured amount needed to release the mortgage. This had the capacity to deceive reasonable consumers into believing that they must pay the "unsecured" fax fees as a condition of the release of their mortgage. Interestingly, the court noted in footnote 3 that the plaintiff/borrower conceded the lender's argument that "the actual charge of a fully disclosed fax fee is not misleading." *Kislak, supra*, footnote 3 at 546.

Footnote 3 of the *Kislak* opinion is extremely significant because it zeroes in on a crucial difference between *Kislak* and the case at bar. As mentioned earlier, the *Kislak* opinion uses the terms "secured" and "unsecured" in describing fees but does not define those terms. That opinion addressed only fees charged for faxing payoff statements, which apparently were not mentioned in the *Kislak* Deed of Trust. The case at bar is distinguishable because it involves a reconveyance fee, which is an obligation secured by plaintiff's Deed of Trust. As shown above, the Deed of Trust secures to the lender

not only the repayment of the debt under the loan agreement, but also the performance of any obligations such as reconveyance fees created by the Deed of Trust itself.

Central to the CPA claims in both *Kislak* and the case at bar is whether the particular fee at issue is fully disclosed. It was conceded in *Kislak* that "the actual charge of a fully disclosed fax fee is not misleading." *Kislak, supra*, footnote 3 at 546. In other words, the *Kislak* plaintiff's CPA claim would have failed had the nature of the fax fee been disclosed. Turning to the case at bar, *Kislak* supports summary judgment dismissal of Peterson's CPA claim because the reconveyance fee was disclosed to Peterson on the Deed of Trust (CP 192), the payoff statement (CP 203), and the "Authorization and Instructions to Close PLC" (CP 205) signed by Peterson. Because from the beginning of Peterson's loan transaction, KCU disclosed to Peterson that reconveyance fees would be charged, and because the reconveyance fees is part of the sum secured by the Deed of Trust, KCU's actions lack the capacity to deceive that is required of a CPA claim.

Kislak clarifies that its decision does not improperly interfere with the lender's right to do business. The court wrote, "the CPA

should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest." *Kislak, supra*, at 548. The court noted that its holding does not interfere with the lender's right to charge a fax fee, so long as the fax fee is not charged in a deceptive manner. *Id.* This logic equally applies to a reconveyance fee charged by a lender. As shown above, there is nothing deceptive about Peterson's reconveyance fee that was charged in this loan transaction.

In the present action, a \$26.00 administrative fee for services actually performed by KCU does not constitute a material fact which should be disclosed under the circumstances where KCU had every legal right to charge a reconveyance fee. Also, Peterson had every opportunity to request an itemization of the \$85.00 reconveyance fee charged to her.

It is well established under Washington law that acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the CPA. See *Capelouto v. Valley Forge Insurance Co.*, 98 Wn.App. 7, 11, 990 P.2d 414 (1999).

In *Perry v. Island Savings & Loan Association*, 101 Wn.2d 795, 684 P.2d 1281 (1984) a borrower challenged enforceability of a due-

on-sale clause in a Deed of Trust. The court held that the lender's action in attempting to enforce the due-on-sale clause was done in good faith under an arguable interpretation of existing law. The court held that such conduct should not be considered "unfair" in the context of consumer protection law. The lender simply attempted to enforce what arguably was a valid and enforceable due-on-sale clause. In the present case, lender KCU simply collected an authorized reconveyance fee.

4. Federal Preemption Analysis

The Federal Preemption doctrine applies to a federally chartered credit union. At all times relevant, KCU was a federally chartered credit union. This appeal can be resolved on the issues previously addressed in this brief without the necessity of resolving the weighty issues associated with federal preemption. There are very few reported decisions involving credit unions and federal preemption. Most of the cases deal with banks and savings and loan institutions for which there is a parallel federal statutory scheme. Recently, the Washington Supreme Court provided a preemption analysis in *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010). As will be discussed herein, the analysis provided

in that case is relevant to the preemption issues presented in this appeal.

Peterson's state law CPA cause of action is preempted by federal law because KCU was a federally chartered credit union pursuant the Federal Credit Union Act, 12 U.S.C. §§ 1751 *et seq.* (FCUA), and National Credit Union Administration (NCUA) regulations, 12 C.F.R. §§ 700 *et seq.* The reconveyance fee charged to Peterson was a loan required term of repayment governed by these authorities. The FCUA and NCUA expressly preempt any state law purporting to limit or affect Federal credit union terms of repayment.

For nearly two centuries, Congressional legislation in the banking field has led to an extensive federal statutory and regulatory scheme. *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). "The history of national banking legislation has been 'one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law.;" *Id.*, citing *Barnett Bank v. Nelson*, 517 U.S. 25, 32, 134 L.Ed.2d 237, 116 S.Ct. 1103 (1996). Because there has been a "history of significant federal presence" in national banking, a presumption

against preemption of state law does not exist in national banking jurisprudence. *Bank of America, supra*, at 559.

Despite the fact that consumer protection law is often the subject of state regulations, state authority in national banking law is limited. *American Bankers Association v. Lockyer*, 239 F.Supp. 2d 1000, 1007 (E.D. Cal. 2002),² citing *Bank of America, supra* at 559. “Consumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks.” *Id.*

The FCUA was enacted to regulate Federal Credit Union activities. *American Bankers Association, supra* at 1018. As a Federally chartered credit union during all times relevant to this lawsuit, KCU was subject to the FCUA. The FCUA authorizes Federal credit unions to make contracts and loans to their members. 12 U.S.C. § 1757(1) and (5). The FCUA also empowers Federal credit unions “to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.” 12 U.S.C. § 1757(17).

² Although *American Bankers Association v. Lockyer* involves preemption of state law dealing with credit card regulation, it is one of few cases which consider preemption in the area of both federal banking and federal credit union legislation.

The NCUA has established rules regulating Federal credit union loans to members. *American Bankers Association, supra* at 1018. "The [NCUA] is granted exclusive authority under the FCUA to 'regulate the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit...to members.'" *Id.*, citing 12 C.F.R. § 701.21(b).

NCUA regulatory authority explicitly preempts any state law purporting to limit or affect: "Closing costs, application, origination, or other fees;" 12 C.F.R. § 701.21(b)(1)(i)(C). The NCUA explains,

...pursuant to § 701.21(b)(1), provisions of state law affecting rates, terms of repayment and other conditions of FCU lending are preempted. This section sets forth a list of areas that are specifically preempted. Included are state laws affecting rate of interest amount of finance charge, use of and limits on variable rate credit, maturity limits and other terms of repayment, and various other conditions. It is noted that the list is exemplary only. It is not intended to be nor should it be considered exhaustive. 49 Fed. Reg. 30683, 30684 (NCUA Aug. 1, 1984).

NCUA regulations also make clear which state laws are *not* preempted. 12 C.F.R. § 701.21(b)(2) provides,

Except as provided by paragraph (b)(1) of this section, it is not the Board's intent to preempt state laws that do not affect rates, terms of repayment and other conditions described above concerning loans and lines of credit, for example:

- (i) Insurance laws;
- (ii) Laws related to transfer of and security interests in real and personal property (see, however, paragraph (g)(6) of this section concerning the use and exercise of due-on-sale clauses);
- (iii) Conditions related to:
 - (A) Collection costs and attorneys' fees;
 - (B) Requirements that consumer lending documents be in "plain language;" and
 - (C) The circumstances in which a borrower may be declared in default and may cure default. 12 C.F.R. §701.21(b)(2).

Absent from this list of state laws which are not preempted are state laws affecting federal credit union loan fees and terms of repayment such as reconveyance fees.

American Bankers Association, supra, is instructive as to federal preemption doctrine and its holding applies to the case before this court. *American Bankers Association* granted summary judgment to plaintiff bank and credit union associations who argued that a California consumer law requiring certain credit card disclosures is preempted by the FCUA and other federal banking law. The California law would have required certain disclosures on credit card statements that the plaintiffs argued would have been costly and

burdensome. The court agreed with plaintiffs that the California law was preempted by NCUA lending regulations and with "NCUA's longstanding position...that state laws affecting terms of repayment are preempted." *American Bankers Association, supra* at 1018, citing 49 Fed. Reg. 30683, 30684 (NCUA Aug. 1, 1984). The court found that the disclosure requirements imposed by the California law conflicted "with the NCUA's broad power to regulate the rates, terms of repayment, and other conditions of federal credit union loans and lines of credit." *American Bankers Association, supra* at 1019.

The FCUA and NCUA regulations clearly apply to KCU as a federally chartered credit union under 12 U.S.C. §§ 1751 *et seq.* Those regulations expressly preempt any state law purporting to limit or affect fees charged in Federal credit union member loan transactions. Federal banking case law provides that reconveyance fees are part of the general category of loan fees which require the application of the federal preemption doctrine.

A reconveyance fee charged by a Federal credit union to its member is a loan fee exclusively within the field of federal regulation. Peterson's CPA cause of action is preempted because it seeks to apply Washington law to what is clearly a federal law matter.

Peterson's claim addresses the manner (lack of disclosure) in which KCU charged a reconveyance fee.

NCUA Associate General Counsel Hattie M. Ulan issued a legal opinion letter dated January 21, 1993 as Opinion Letter No. 92-1131. A copy is attached as Exhibit 1 to the Declaration of Frank R. Siderius (CP 415-421).

In pertinent part the opinion letter states as follows:

In our opinion, both fees collected to reimburse and (sic) FCU for actual recording fees paid to public officials, and fees for preparation and/or filing of a mortgage satisfaction document are within the purview of Section 701.21(b)(1)(i)(C).

NCUA regulations at 12 C.F.R. Section 701.21(b)(1) provide that federal law preempts any state law purporting to regulate "the rates, terms of repayment and other conditions" of federal credit union loans and lines of credit. Section 701.21(b)(1)(i)(C) specifically calls for preemption of state law purporting to limit or affect closing costs, application, origination, or other fees. The NCUA associate general counsel was interpreting Pennsylvania law which might preclude a federal credit union from collecting fees for mortgage satisfaction preparation.

KCU has argued, consistent with this NCUA opinion letter, that Deed of Trust reconveyance fees (analogous to a mortgage satisfaction fee) are regulated by the NCUA. It is well established that agency interpretations contained in opinion letters are entitled to respect to the extent they are persuasive. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This case was cited in *Fultz v. World Savings & Loan Assoc.*, 571 F.Supp.2d 1195 (W.D. Wa. 2008).

More recently, the NCUA issued an opinion of Associate General Counsel Sheila A. Albin on July 14, 2008 as Opinion Letter 08-0120. A copy of this Opinion Letter is attached as Exhibit 2 to the Declaration of Frank R. Siderius. (CP 415-421.)

The NCUA was responding to an opinion request from a Massachusetts federal credit union pertaining to CPA regulations in Massachusetts. The Massachusetts state regulations purported to define and prohibit certain types of activities by mortgage brokers and mortgage lenders as "unfair or deceptive acts or practices."

The Massachusetts statute contains a provision stating as follows:

Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.

The WCPA contains a similar provision at RCW 19.86.170.

That section reads as follows:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by... or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States...

The NCUA counsel determined that a preemption analysis was not necessary because the Massachusetts statute, like its Washington state counterpart, did not apply to federal credit union lending activities. As stated in the Opinion Letter, "Federal law, the Federal Credit Union Act, permits FCUs to engage in lending, including mortgage lending, and the National Credit Union Administration (NCUA), a regulatory board, regulates those activities under the authority of the same federal law. 12 USC §1751, *et seq.*"

The WCPA clearly provides that it shall not apply to actions or transactions regulated under statutory authority of the United States.

Clearly this most recent legal opinion from the NCUA leads to a conclusion that NCUA regulations govern any claim that deals with

the deceptiveness of mortgage lender services provided by a federal credit union.

On August 1, 1984 the NCUA Board adopted revised regulations concerning federal credit union loans to members. The regulations were enacted as 12 C.F.R. Part 701. Supplementary information regarding these regulations is found at 49 FR 30683.

It is important to illustrate the NCUA's intent to provide a broad federal preemption rule. In this regard we focus the court's attention on the following:

Section 701.21(b) Relation to other laws

The proposed rule contained a general statement of NCUA's intent to preempt state laws affecting the rates, terms and conditions of loans and lines of credit to Federal credit union members. The proposal prompted many comments for further guidance from NCUA in the area of Federal preemption. Accordingly, NCUA has developed a more detailed explanation of its intent with respect to preemption of state laws. The general preemption language in the proposed rule has been deleted and a completely new preemption section has been placed in the final rule (Section 701.21(b), Relation to Other Laws). Section 701.21(b) is a five part explanation of the extent to which the Federal Credit Union Act and NCUA's regulations preempt other laws affecting loans and lines of credit offered by Federal credit unions.

Sections 701.21(b)(1)-(3) establish three 'baskets' for preemption purposes:

First, pursuant to §701.21(b)(1), provisions of state law affecting rates, terms of repayment and other conditions of FCU lending are preempted. This section sets forth a list of areas that are specifically preempted. Included are state laws affecting rate of interest, amount of finance charge, use of and limits on variable rate credit, maturity limits and other terms of repayment, and various other conditions. It is noted that the list is exemplary only. It is not intended to be nor should it be considered exhaustive.

Terms of repayment are clearly within the purview of the NCUA regulation. The aforementioned opinion letters specifically apply to the issue before this court.

The most recent analysis of federal preemption provided by Washington courts is the Washington State Supreme Court opinion in *McCurry v. Chevy Chase Bank, FSB, supra*. Although that case applies the Federal Homeowners Loan Act (HOLA) and its Office of Thrift Supervision (OTS), the federal preemption analysis is relevant to the parallel statutory scheme found in the Federal Credit Union Act and the National Credit Union Administration (NCUA) regulations.

In a divided opinion, our State Supreme Court analyzed the applicability of federal preemption to fax and notary fees charged by Chevy Chase in a payoff statement. The court held that charging fax fees that were not permitted by the Deed of Trust had only an

incidental effect on lending and thus, the breach of contract and CPA claims were not preempted.

The court narrowly ruled that generally applicable state laws, such as contract or commercial law, are not preempted where they only incidentally affect the lending operations or are otherwise consistent with the purposes of preemption. Forcing Chevy Chase to adhere to the terms of its contract (which did not specifically allow fax and notary fees under the terms of the Deed of Trust) only incidentally affects lending operations. As such, the claim was not preempted.

The CPA claim asserted that Chevy Chase fraudulently represented that reconveyance of title was only possible under the terms of the Deed of Trust if fax and notary fees were paid. The court interpreted the CPA claim as solely based upon representations made through the contract. As such, the state law precluding a party from misrepresenting the terms of its contract was one of general applicability, having only an incidental effect on federal loan operations.³ Thus, the CPA claim was not preempted.

³ It should be noted that lending regulations for federal savings associations, 12 C.F.R. §560.2(c), specifically exclude from preemption state laws that only "incidentally affect" lending operations. No such language appears in the regulations

In the present action, Peterson is not challenging the right of KCU to charge a contractually authorized reconveyance fee. Rather, Peterson seeks to impose a loan requirement, absent from the contract, that KCU itemize and disclose a breakdown of the reconveyance fee. Additionally, Peterson claims KCU should not retain any portion of the reconveyance fee for services it provides. Only out-of-pocket costs should be included. Peterson and the trial court impose a new lending requirement that the amount of reconveyance fees must be itemized in order to be fully disclosed. Further, KCU is only allowed to collect actual costs it incurs.

The *McCurry* court at p. 105 states:

If and to the extent that McCurrys argue the CPA regulates how or when fax or notary fees (loan-related fees) can be charged, the CPA, as applied directly to the loan related fees, is preempted.

Peterson would dictate how and in what manner reconveyance fees can be charged. The effect of Peterson's claim is to impose, at the state level, a substantive requirement mandating how in the loan process such fees must be disclosed. This is a more than incidental effect on lending operations. As previously indicated herein, NCUA

for federal credit unions, 12 CFR §701(21)(b)(2), which exclude from preemption "state laws that do not affect rates, terms of repayment and other conditions. . . "

regulatory authority explicitly preempts any state law purporting to limit or affect "Closing costs, application, origination or other fees;" 12 C.F.R. §701.21(b)(i)(C) and "Terms of repayment . . ." 12 C.F.R. §701.21(b)(ii).

For the foregoing reasons, the *McCurry* decision supports KCU's federal preemption argument. Special attention should be noted to footnote 7 at p. 107 of the opinion and the majority's reference to *Moskowitz v. Washington Mutual Bank, FA*, 329 Ill.App.3d 144, 148, 768 N.E.2d 262 (2002). The court stated:

The basis for the *Moskowitz* plaintiff's contract and consumer fraud claims was that state law required the bank to disclose the payoff statement fees in the contract, that requirement constituted a regulation of lending operations, and that the state laws were thus preempted.

While the present appeal can be decided without application of a preemption analysis, federal preemption of the Peterson claim is mandated by the NCUA and is in accord with the *McCurry* analysis.

E. CONCLUSION

The trial court initially correctly dismissed all of Peterson's causes of action including the breach of contract and WCPA claims. That initial Order Granting Defendant's Motion for Summary Judgment

(CP 236-237) should be reinstated. The Order reconsidering dismissal and reinstating the CPA claim was error.

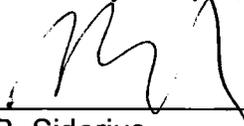
Summary judgment in favor of Peterson on the WCPA claim should be reversed along with the final judgment which was entered in favor of plaintiff and the class.

The reconveyance fee charged by KCU upon loan payoff by Peterson was expressly authorized by the Deed of Trust contract. The \$85.00 fee which included recordation costs was reasonable and, as a matter of law, did not constitute an unfair or deceptive act or practice under the WCPA.

Additionally, Peterson's causes of action are preempted by federal credit union law.

Finally, if there are claims that KCU did not provide necessary services justifying the \$26.00 payment, or that the \$26.00 charge was excessive or unreasonable, these are material issues of fact precluding summary judgment by the trial court.

Respectfully submitted this 27th day of April, 2011.



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Attorneys for Appellant/Plaintiff

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Declaration of Service

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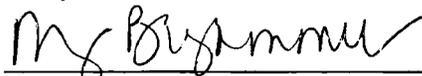
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Dated this 26th day of April, 2011.



Mary Berghammer

APPENDIX

12 USC §1757

12 C.F.R. §701.21

49 Fed. Reg. 30683



LEXSTAT 12 U.S.C. SEC. 1757

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*** CURRENT THROUGH PL 112-8, APPROVED 4/9/2011 ***

TITLE 12. BANKS AND BANKING
 CHAPTER 14. FEDERAL CREDIT UNIONS
 GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

12 USCS § 1757

§ 1757. Powers [Caution: See prospective amendment note below.]

A Federal credit union shall have succession in its corporate name during its existence and shall have power--

- (1) to make contracts;
- (2) to sue and be sued;
- (3) to adopt and use a common seal and alter the same at pleasure;
- (4) to purchase, hold, and dispose of property necessary or incidental to its operations;
- (5) to make loans, the maturities of which shall not exceed 15 years, except as otherwise provided herein, and extend lines of credit to its members, to other credit unions, and to credit union organizations and to participate with other credit unions, credit union organizations, or financial organizations in making loans to credit union members in accordance with the following:

(A) Loans to members shall be made in conformity with criteria established by the board of directors: *Provided*, That--

(i) a residential real estate loan on a one-to-four-family dwelling, including an individual cooperative unit, that is or will be the principal residence of a credit union member, and which is secured by a first lien upon such dwelling, may have a maturity not exceeding thirty years or such other limits as shall be set by the National Credit Union Administration Board (except that a loan on an individual cooperative unit shall be adequately secured as defined by the Board), subject to the rules and regulations of the Board;

(ii) a loan to finance the purchase of a mobile home, which shall be secured by a first lien on such mobile home, to be used by the credit union member as his residence, a loan for the repair, alteration, or improvement of a residential dwelling which is the residence of a credit union member, or a second mortgage loan secured by a residential dwelling which is the residence of a credit union member, shall have a maturity not to exceed 15 years or any longer term which the Board may allow;

(iii) a loan secured by the insurance or guarantee of, or with advance commitment to purchase the loan by, the Federal Government, a State government, or any agency of either may be made for the maturity and under the terms and conditions specified in the law under which such insurance, guarantee, or commitment is provided;

(iv) a loan or aggregate of loans to a director or member of the supervisory or credit committee of the credit union making the loan which exceeds \$ 20,000 plus pledged shares, be approved by the board of directors;

(v) loans to other members for which directors or members of the supervisory or credit committee act as guarantor or endorser be approved by the board of directors when such loans standing alone or when added to any outstanding loan or loans of the guarantor or endorser exceeds \$ 20,000;

(vi) the rate of interest may not exceed 15 per centum per annum on the unpaid balance inclusive of all finance charges, except that the Board may establish--

(I) after consultation with the appropriate committees of the Congress, the Department of Treasury, and the Federal financial institution regulatory agencies, an interest rate ceiling exceeding such 15 per centum per annum rate, for periods not to exceed 18 months, if it determines that money market interest rates have risen over the preceding six-month period and that prevailing interest rate levels threaten the safety and soundness of individual credit unions as evidenced by adverse trends in liquidity, capital, earnings, and growth; and

(II) a higher interest rate ceiling for Agent members of the Central Liquidity Facility in carrying out the provisions of title III [12 USCS §§ 1795 et seq.] for such periods as the Board may authorize;

(vii) the taking, receiving, reserving, or charging of a rate of interest greater than is allowed by this paragraph, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back from the credit union taking or receiving the same, in an action in the nature of an action of debt, the entire amount of interest paid; but such action must be commenced within two years from the time the usurious collection was made;

(viii) a borrower may repay his loan, prior to maturity in whole or in part on any business day without penalty, except that on a first or second mortgage loan a Federal credit union may require that any partial prepayments (I) be made on the date monthly installments are due, and (II) be in the amount of that part of one or more monthly installments which would be applicable to principal;

(ix) loans shall be paid or amortized in accordance with rules and regulations prescribed by the Board after taking into account the needs or conditions of the borrowers, the amounts and duration of the loans, the interests of the members and the credit unions, and such other factors as the Board deems relevant;

(x) loans must be approved by the credit committee or a loan officer, but no loan may be made to any member if, upon the making of that loan, the member would be indebted to the Federal credit union upon loans made to him in an aggregate amount which would exceed 10 per centum of the credit union's unimpaired capital and surplus.

(B) A self-replenishing line of credit to a borrower may be established to a stated maximum amount on certain terms and conditions which may be different from the terms and conditions established for another borrower.

(C) Loans to other credit unions shall be approved by the board of directors.

(D) Loans to credit union organizations shall be approved by the board of directors and shall not exceed 1 per centum of the paid-in and unimpaired capital and surplus of the credit union. A credit union organization means any organization as determined by the Board, which is established primarily to serve the needs of its member credit unions, and whose business relates to the daily operations of the credit unions they serve.

(E) Participation loans with other credit unions, credit union organizations, or financial organizations shall be in accordance with written policies of the board of directors: *Provided*, That a credit union which originates a loan for which participation arrangements are made in accordance with this subsection shall retain an interest of at least 10 per centum of the face amount of the loan;

(6) to receive from its members, from other credit unions, from an officer, employee, or agent of those nonmember units of Federal, Indian tribal, State, or local governments and political subdivisions thereof enumerated in section 207 of this Act [12 USCS § 1787] and in the manner so prescribed, from the Central Liquidity Facility, and from nonmembers in the case of credit unions serving predominately low-income members (as defined by the Board) payments, representing equity, on--

(A) shares which may be issued at varying dividend rates;

(B) share certificates which may be issued at varying dividend rates and maturities; and

(C) share draft accounts authorized under section 205(f) [12 USCS § 1785(f)];

subject to such terms, rates, and conditions as may be established by the board of directors, within limitations prescribed by the Board;

(7) to invest its funds (A) in loans exclusively to members; (B) in obligations of the United States of America, or securities fully guaranteed as to principal and interest thereby; (C) in accordance with rules and regulations prescribed by the Board, in loans to other credit unions in the total amount not exceeding 25 per centum of its paid-in and unimpaired capital and surplus; (D) in shares or accounts of savings and loan associations or mutual savings banks, the accounts of which are insured by the Federal Deposit Insurance Corporation; (E) in obligations issued by banks for cooperatives, Federal land banks, Federal intermediate credit banks, Federal home loan banks, the Federal Housing Finance Board, or any corporation designated in section 101 of the Government Corporation Control Act [31 USCS § 9101(3)] as a wholly owned Government corporation; or in obligations, participations, or other instruments of or issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association or the Government National Mortgage

Association; or in mortgages, obligations, or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act [12 USCS § 1454 or 1455] or in obligations or other instruments or securities of the Student Loan Marketing Association; or in obligations, participations, securities, or other instruments of, or issued by, or fully guaranteed as to principal and interest by any other agency of the United States and a Federal credit union may issue and sell securities which are guaranteed pursuant to section 306(g) of the National Housing Act [12 USCS § 1721(g)]; (F) in participation certificates evidencing beneficial interests in obligations, or in the right to receive interest and principal collections therefrom, which obligations have been subjected by one or more Government agencies to a trust or trusts for which any executive department, agency, or instrumentality of the United States (or the head thereof) has been named to act as trustee; (G) in shares or deposits of any central credit union in which such investments are specifically authorized by the board of directors of the Federal credit union making the investment; (H) in shares, share certificates, or share deposits of federally insured credit unions; (I) in the shares, stocks, or obligations of any other organization, providing services which are associated with the routine operations of credit unions, up to 1 per centum of the total paid in and unimpaired capital and surplus of the credit union with the approval of the Board: *Provided, however,* That such authority does not include the power to acquire control directly or indirectly, of another financial institution, nor invest in shares, stocks or obligations of an insurance company, trade association, liquidity facility or any other similar organization, corporation, or association, except as otherwise expressly provided by this Act [12 USCS §§ 1751 et seq.]; (J) in the capital stock of the National Credit Union Central Liquidity Facility; (K) investments in obligations of, or issued by, any State or political subdivision thereof (including any agency, corporation, or instrumentality of a State or political subdivision), except that no credit union may invest more than 10 per centum of its unimpaired capital and surplus in the obligations of any one issuer (exclusive of general obligations of the issuer);

(8) to make deposits in national banks and in State banks, trust companies, and mutual savings banks operating in accordance with the laws of the State in which the Federal credit union does business, or in banks or institutions the accounts of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, and for Federal credit unions or credit unions authorized by the Department of Defense operating suboffices on American military installations in foreign countries or trust territories of the United States to maintain demand deposit accounts in banks located in those countries or trust territories, subject to such regulations as may be issued by the Board and provided such banks are correspondents of banks described in this paragraph;

(9) to borrow, in accordance with such rules and regulations as may be prescribed by the Board, from any source, in an aggregate amount not exceeding, except as authorized by the Board in carrying out the provisions of title III [12 USCS §§ 1795 et seq.], 50 per centum of its paid-in and unimpaired capital and surplus: *Provided,* That any Federal credit union may discount with or sell to any Federal intermediate credit bank any eligible obligations up to the amount of its paid-in and unimpaired capital;

(10) to levy late charges, in accordance with the bylaws, for failure of members to meet promptly their obligations to the Federal credit union;

(11) to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him;

(12) in accordance with regulations prescribed by the Board--

(A) to sell, to persons in the field of membership, negotiable checks (including travelers checks), money orders, and other similar money transfer instruments (including international and domestic electronic fund transfers and remittance transfers, as defined in section 919 of the Electronic Fund Transfer Act [15 USCS § 1693o-1]); and

(B) to cash checks and money orders for persons in the field of membership for a fee;

(13) in accordance with rules and regulations prescribed by the Board, to purchase, sell, pledge, or discount or otherwise receive or dispose of, in whole or in part, any eligible obligations (as defined by the Board) of its members and to purchase from any liquidating credit union notes made by individual members of the liquidating credit union at such prices as may be agreed upon by the board of directors of the liquidating credit union and the board of directors of the purchasing credit union, but no purchase may be made under authority of this paragraph if, upon the making of that purchase, the aggregate of the unpaid balances of notes purchased under authority of this paragraph would exceed 5 per centum of the unimpaired capital and surplus of the credit union;

(14) to sell all or a part of its assets to another credit union, to purchase all or part of the assets of another credit union and to assume the liabilities of the selling credit union and those of its members subject to regulations of the Board;

(15) to invest in securities that--

(A) are offered and sold pursuant to section 4(5) of the Securities Act of 1933 (15 U.S.C. 77d(5));

(B) are mortgage related securities (as that term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 (*15 U.S.C. 78c(a)(41)*)), subject to such regulations as the Board may prescribe, including regulations prescribing minimum size of the issue (at the time of initial distribution) or minimum aggregate sales prices, or both; or

(C) are small business related securities (as defined in section 3(a)(53) of the Securities Exchange Act of 1934), subject to such regulations as the Board may prescribe, including regulations prescribing the minimum size of the issue (at the time of the initial distribution), the minimum aggregate sales price, or both;

(16) subject to such regulations as the Board may prescribe, to provide technical assistance to credit unions in Poland and Hungary; and

(17) to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.

HISTORY:

(June 26, 1934, ch 750, Title I, § 107[8][7], 48 Stat. 1218; Dech 6, 1937, ch 3, § 2, 51 Stat. 4; July 31, 1946, ch 711, § 1, 60 Stat. 744; Oct. 25, 1949, ch 713, § 1, 63 Stat. 890; May 13, 1952, ch 264, 66 Stat. 70; Sept. 22, 1959, P.L. 86-354, § 1, 73 Stat. 630; July 2, 1964, P.L. 88-353, § 1, 78 Stat. 269; May 24, 1966, P.L. 89-429, § 7, 80 Stat. 167; July 3, 1967, P.L. 90-44, §§ 2, 3, 81 Stat. 110, 111; July 5, 1968, P.L. 90-375, §§ 1(1), (2), (3), 82 Stat. 284; Aug. 1, 1968, P.L. 90-448, Title VIII, § 807(n), 82 Stat. 545; March 10, 1970, P.L. 91-206, § 2(1), 84 Stat. 49; Oct. 19, 1970, P.L. 91-468, §§ 1(2), 10, 84 Stat. 994, 1017; June 23, 1972, P.L. 92-318, Title I, Part D, § 133(c)(4), 86 Stat. 270; Aug. 22, 1974, P.L. 93-383, Title VII, § 721, Title VIII, § 805(c)(5), 88 Stat. 719, 727; Oct. 28, 1974, P.L. 93-495, Title I, § 101(d), 88 Stat. 1502; Dec. 31, 1974, P.L. 93-569, § 6, 88 Stat. 1866; April 19, 1977, P.L. 95-22, Title III, §§ 302, 303, 91 Stat. 49-51; Nov. 10, 1978, P.L. 95-630, Title V, § 502(b), Title XVIII, § 1803, 92 Stat. 3681, 3723; Dec. 21, 1979, P.L. 96-153, Title III, § 323(d), 93 Stat. 1120; Dec. 28, 1979, P.L. 96-161, Title I, § 103(b), 93 Stat. 1234; March 31, 1980, P.L. 96-221, Title III, §§ 305(b), 307, 309(a)(1), 310, 94 Stat. 146-149; Oct. 15, 1982, P.L. 97-320, Title V, §§ 506-514, 516-518, 96 Stat. 1528-1530; Jan. 12, 1983, P.L. 97-457, §§ 25, 26, 96 Stat. 2510; Oct. 3, 1984, P.L. 98-440, Title I, § 105(b), 98 Stat. 1691; Oct. 17, 1984, P.L. 98-479, Title II, § 206, 98 Stat. 2234; Aug. 10, 1987, P.L. 100-86, Title VII, §§ 702, 703, 101 Stat. 652; Nov. 28, 1989, P.L. 101-179, Title II, § 206(b), 103 Stat. 1311; Sept. 23, 1994, P.L. 103-325, Title II, Subtitle A, § 206(b), 108 Stat. 2199; Sept. 30, 1996, P.L. 104-208, Div A, Title II, Subtitle C, § 2306, 110 Stat. 3009-426; Oct. 13, 2006, P.L. 109-351, Title V, §§ 502, 503, Title VII, § 726(3)-(8), 120 Stat. 1975, 2002.)

(As amended July 21, 2010, P.L. 111-203, Title III, Subtitle E, § 362(1), Title X, Subtitle G, § 1073(d), 124 Stat. 1549, 2066.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Section 3(a)(53) of the Securities Exchange Act of 1934", referred to in para. (15)(C), is § 3(a)(53) of Act June 6, 1934, which appears as *15 USCS § 78c(a)(53)*.

Explanatory notes:

In para. (7), "*31 USCS § 9101(3)*" has been inserted in brackets pursuant to § 4(b) of Act Sept. 13, 1982, P.L. 97-258, which appears as a note preceding *31 USCS § 101*. Section 1 of such Act enacted Title 31 as positive law, and § 4(b) of such Act provided that a reference to a law replaced by § 1 of such Act is deemed to refer to the corresponding provision enacted by such Act.

Prospective amendment:

Amendment of para. (8), effective on transfer date. Act July 21, 2010, P.L. 111-203, Title III, Subtitle E, § 362(1), 124 Stat. 1549 (effective on the transfer date (as such date is defined in § 311 of such Act, which appears as *12 USCS § 5411*), as provided by § 351 of such Act, which appears as *2 USCS § 906* note), provides that para. (8) of this section is amended by striking "or the Federal Savings and Loan Insurance Corporation".

Amendments:

1937 Act Dec. 6, 1937, in para. (7), added subparas. (c) and (d).

1946. Act July 31, 1946, in para. (5), inserted "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by this subsection, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, the entire amount of interest thus paid from the credit union taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

1949. Act Oct. 25, 1949, in para. (5), substituted "three years" for "two years".

1952. Act May 13, 1952, in para. (7)(d), substituted "or in shares or accounts of Federal savings and loan associations and in shares or accounts of any other institution, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation." for "and in shares or accounts of Federal savings and loan associations."

1959. Act Sept. 22, 1959, substituted this section for one which read:

"A Federal credit union shall have succession in its corporate name during its existence and shall have power--

"(1) To make contracts.

"(2) To sue and be sued.

"(3) To adopt and use a common seal and alter the same at pleasure.

"(4) To purchase, hold, and dispose of property necessary and incidental to its operations.

"(5) To make loans with maturities not exceeding three years to its members for provident or productive purposes upon such terms and conditions as this Act and the bylaws provide and as the credit committee may approve, at rates of interest not exceeding 1 per centum per month on unpaid balances (inclusive of all charges incident to making the loan): *Provided*, That no loans to a director, officer, or member of a committee shall exceed the amount of his holdings in the Federal credit union as represented by shares thereof. No director, officer, or committee member shall endorse for borrowers. A borrower may repay his loan, prior to maturity, in whole or in part on any business day. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by this subsection, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, the entire amount of interest thus paid from the credit union taking or receiving the same. *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

"(6) To receive from its members payments on shares.

"(7) To invest its funds (a) in loans exclusively to members; (b) in obligations of the United States of America, or securities fully guaranteed as to principal and interest thereby; (c) in accordance with rules and regulations prescribed by the Governor, in loans to other credit unions in the total amount not exceeding 25 per centum of its paid-in and unimpaired capital and surplus; (d) or in shares or accounts of Federal savings and loan associations and in shares or accounts of any other institution, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation.

"(8) To make deposits in national banks and in State banks, trust companies, and mutual savings banks operating in accordance with the laws of the State in which the Federal credit union does business.

"(9) To borrow (from any source) in an aggregate amount not exceeding 50 per centum of its paid-in and unimpaired capital and surplus: *Provided*, That any Federal credit union may discount with or sell to any Federal intermediate credit bank any eligible obligations up to the amount of its paid-in and unimpaired capital, subject to such rules and regulations as may be prescribed by the Governor.

12 USCS § 1757

"(10) To fine members, in accordance with the bylaws, for failure to meet promptly their obligations to the Federal credit union.

"(11) To impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or fines payable by him.

"(12) To exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated."

1964. Act July 2, 1964, in para. (7), deleted "or" before "(D)" and added "or (E) in obligations issued by banks for cooperatives, Federal land banks, Federal intermediate credit banks, Federal home loan banks, the Federal Home Loan Bank Board, or any corporation designated in section 101 of the Government Corporation Control Act as a wholly owned Government corporation;"

1966. Act May 24, 1966, substituted para. (7) for one which read: "(7) to invest its funds (A) in loans exclusively to members; (B) in obligations of the United States of America, or securities fully guaranteed as to principal and interest thereby; (C) in accordance with rules and regulations prescribed by the Director, in loans to other credit unions in the total amount not exceeding 25 per centum of its paid-in and unimpaired capital and surplus; (D) in shares or accounts of savings and loan associations, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; or (E) in obligations issued by banks for cooperatives, Federal land banks, Federal intermediate credit banks, Federal home loan banks, the Federal Home Loan Bank Board, or any corporation designated in section 101 of the Government Corporation Control Act as a wholly owned Government corporation;"

1967. Act July 3, 1967, in para. (5), substituted "may be made except as authorized under paragraph (6) of this section" for "shall exceed the amount of his holdings in the Federal Credit Union as represented by shares thereof plus the total unencumbered and unpledged shareholdings in the Federal Credit Union of any member pledged as security for the obligation of such director or committee member", redesignated paras. (6) through (13) as paras. (7) through (14), respectively, and added para. (6), and in para. (8), as so redesignated, substituted subpara. (D) for one which read: "in shares or accounts of savings and loan associations, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;"

1968. Act July 5, 1968, in para. (5), substituted "unsecured loans with maturities not exceeding 5 years, and secured loans with maturities not exceeding ten years" for "loans with maturities not exceeding five years", in para. (8), deleted "or" before "(F)" and added subpara. (G), in para. (13) deleted "and" following "credit union;", redesignated para. (14) as para. (15), and added para. (14).

Act Aug. 1, 1968 (effective no more than 120 days following the date of enactment on 8/1/68, as provided by § 808 of such Act, which appears as *12 USCS § 1716b* note), in para. (8)(E), inserted "or the Government National Mortgage Association".

1970. Act March 10, 1970, in paras. (5), (6), (8), (10), (13), (14), substituted "Administrator" for "Director" wherever appearing.

Act Oct. 19, 1970, substituted para. (7) for one which read: "To receive from its members payments on shares.", and in para. (8), inserted "and (H) in shares, share certificates, or share deposits of federally insured credit unions;"

1972. Act June 23, 1972, in para. (8)(E), inserted "or in obligations or other instruments or securities of the Student Loan Marketing Association".

1974. Act Aug. 22, 1974, substituted para. (6) for one which read:

"(6) to make loans to its own directors and to members of its own supervisory or credit committee, but all such loans shall be reported to the Administrator at least annually, and such a loan may be made only if--

12 USCS § 1757

"(A) the loan complies with all lawful requirements under this Act with respect to loans to other borrowers and is not on terms more favorable than those extended to other borrowers;

"(B) upon the making of the loan, the aggregate amount of loans outstanding to the borrower will not exceed the total amount of shareholdings in the credit union, not otherwise encumbered or pledged, which are pledged as security for loans to the borrower, or \$ 5,000, whichever is greater;

"(C) upon the making of the loan, the aggregate amount of loans outstanding under authority of this paragraph will not exceed 20 per centum of the unimpaired capital and surplus of the credit union;

"(D) the loan is approved by the credit committee and by the board of directors after the submission to them of a detailed current financial statement by the borrower; and

"(E) the borrower takes no part in the consideration of his application and does not attend any committee or board meeting while his application is under consideration;"

Such Act further in para. (8)(E), inserted "; or in mortgages, obligations, or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act;"; and in para. (9), inserted ", and for Federal credit unions or credit unions authorized by the Department of Defense operating suboffices on American military installations in foreign countries or trust territories of the United States to maintain demand deposit accounts in banks located in those countries or trust territories, subject to such regulations as may be issued by the Administrator and provided such banks are correspondents of banks described in this paragraph".

Act Oct. 28, 1974 (effective 30 days after 10/28/74, as provided by § 101(g) of such Act, which appears as *12 USCS § 1813* note), in para. (7), inserted "and to receive from an officer, employee, or agent of those nonmember units of Federal, State, or local governments and political subdivisions thereof enumerated in section 207 of this Act (*12 U.S.C. 1787*) and in the manner so prescribed payments on shares, share certificates, and share deposits;"

Act Dec. 31, 1974, in para. (5), inserted "except that loans made in accordance with section 2(b) of the National Housing Act and section 1819 of title 38, United States Code, may be for the maturities specified therein,"

1977. Act April 19, 1977, substituted para. (5) for one which read: "To make unsecured loans with maturities not exceeding five years, and secured loans with maturities not exceeding ten years, except that loans made in accordance with section 2(b) of the National Housing Act and section 1819 of title 38, United States Code, may be for the maturities specified therein, to its members for provident or productive purposes upon such terms and conditions as this Act and its bylaws provide and as the credit committee or a loan officer may approve, at rates of interest not exceeding 1 per centum per month on unpaid balances, inclusive of all charges incident to making the loan; except that no loans to a director or member of the supervisory or credit committee may be made except as authorized under paragraph (6) of this section. No director or member of the supervisory or credit committee shall endorse for borrowers. A borrower may repay his loan, prior to maturity, in whole or in part on any business day. The taking, receiving, reserving, or charging of a rate of interest greater than is allowed by this paragraph, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back from the credit union taking or receiving the same, in an action in the nature of an action of debt, the entire amount of interest paid; but such action must be commenced within two years from the time the usurious collection was made. Loans shall be paid or amortized in accordance with rules and regulations prescribed by the Administrator after taking into account the needs or conditions of the borrowers, the amounts and duration of the loans, the interests of the members and the credit unions, and such other factors as the Administrator deems relevant, but such rules and regulations shall not require payments more frequently than annually;"; and deleted para. (6) which read:

"(6) to make loans to its own directors and to members of its own supervisory or credit committee, but all such loans shall be reported to the Administrator at least annually, and such a loan may be made only if--

"(A) the loan complies with all lawful requirements under this Act with respect to loans to other borrowers and is not on terms more favorable than those extended to other borrowers;

"(B) upon the making of the loan, the aggregate amount of loans outstanding to the borrower will not exceed the total amount of shareholdings in the credit union, not otherwise encumbered or pledged, which are pledged as security for loans to the borrower, or \$ 5,000, whichever is greater;

"(C) upon the making of the loan, the aggregate amount of loans outstanding under authority of this paragraph will not exceed 20 per centum of the unimpaired capital and surplus of the credit union;

"(D) the loan is approved by the credit committee and by the board of directors after the submission to them of a detailed current financial statement by the borrower; and

"(E) the borrower takes no part in the consideration of his application and does not attend any committee or board meeting while his application is under consideration;"

Such Act further, redesignated para. (7) as para. (6), and as so designated, substituted para. (6) for one which read: "to receive from its members or other federally insured credit unions payments on shares, share certificates, or share deposits, and, in the case of credit unions serving predominantly low-income members (as defined by the Administrator), to receive payments on shares, share certificates, or share deposits from nonmembers; and to receive from an officer, employee, or agent of those nonmember units of Federal, State, or local governments and political subdivisions thereof enumerated in section 207 of this Act (*12 U.S.C. 1787*) and in the manner so prescribed payments on shares, share certificates, and share deposits;" redesignated para. (8) as para. (7), and in para. (7), as so designated, added subpara. (I), redesignated paras. (9)-(14) as paras. (8)-(13), in para. (13), as so designated, inserted after the comma "to purchase, sell, pledge, or discount or otherwise receive or dispose of, in whole or in part, any eligible obligations (as defined by the Administrator) of its members and", and added para. (14).

1978. Act Nov. 10, 1978, in paras. (5)(A)(i), (ix), (D), (6), (7)(C), (I), (8), (9), (12), (13), and (14) substituted "Board" for "Administrator".

Such Act further (effective 10/1/79, as provided by § 1806 of such Act, which appears as *12 USCS § 1795* note), in para. (6), inserted "from the Central Liquidity Facility," in para. (7), deleted "and" preceding subpara. (H), inserted "and, (J) in the capital stock of the National Credit Union Central Liquidity Facility;" and in para. (9), inserted ", except as authorized by the Administrator in carrying out the provisions of subchapter III,".

1979. Act Dec. 21, 1979, in para. (6), inserted "Indian tribal,".

Act Dec. 28, 1979 (effective 12/31/79, and to remain in effect until the close of 3/31/80, as provided by § 104 of such Act, which appears as *12 USCS § 371a*), in para. (6), inserted ", and to issue, deal in, and accept share drafts as orders of withdrawal against shares, subject to such terms, rates, and conditions as may be prescribed by the Board".

1980. Act March 31, 1980, § 307 (effective at the close of 3/31/80, as provided by § 306 of such Act, which appears as *12 USCS § 371a* note), repealed Act Dec. 28, 1979, P.L. 96-161, §§ 101-103, 93 Stat. 1234, which amended para. (6) of this section; see the 1979 Amendment note to this section.

Such Act further, in para. (5) (A), in cl. (i), inserted ", including an individual cooperative unit," and "(except that a loan on an individual cooperative unit shall be adequately secured as defined by the Board), and substituted cl. (vi) for one which read:

"(vi) the rate of interest not exceed 1 per centum per month on the unpaid balance inclusive of all service charges;" and in para. (6), substituted "credit unions serving predominately low-income members (as defined by the Board) payments on--

"(A) shares which may be issued at varying dividend rates;

"(B) share certificates which may be issued at varying dividend rates and maturities; and

"(C) share draft accounts authorized under section 205(f); subject to such terms, rates, and conditions as may be established by the board of directors, within limitations prescribed by the Board." for "credit unions serving predominately low-income members (as defined by the Board) payments on shares which may be issued at varying dividend rates, and payments on share certificates which may be issued at varying dividend rates and maturities, subject to such terms, rates, and conditions as may be established by the board of directors, within limitations prescribed by the Board., and to issue, deal in, and accept share drafts as orders of withdrawal against shares, subject to such terms, rates, and conditions as may be prescribed by the Board;".

1982. Act Oct. 15, 1982, in para. (5)(A), in cl. (i), substituted "on" preceding "a one-to-four family" for "which is made to finance the acquisition of" and substituted "that is or will be" for "for", deleted "the sales price of which is not more than 150 per centum of the median sales price of residential real property situated in the geographical area (as determined by the board of directors) in which the property is located," as shall be set by the National Credit Union Association Board", and substituted cls. (ii) and (iii) for ones which read: following "credit union member," inserted "or such other limits as shall be set by the National Credit Union Association Board", and substituted cls. (ii) and (iii) for ones which read:

12 USCS § 1757

"(ii) a loan to finance the purchase of a mobile home, which shall be secured by a first lien on such mobile home, to be used by the credit union member as his residence, or for the repair, alteration, or improvement of a residential dwelling which is the residence of a credit union member shall have a maturity not to exceed fifteen years unless such loan is insured or guaranteed as provided in subparagraph (iii);

"(iii) a loan secured by the insurance or guarantee of the Federal Government, of a State government, or any agency of either may be made for the maturity and under the terms and conditions specified in the law under which such insurance or guarantee is provided;"

Such Act further, in para. (5)(A), in cls. (iv) and (v), substituted "\$ 10,000" for "\$ 5,000", in cl. (viii), inserted ", except that on a first or second mortgage loan a Federal credit union may require that any partial prepayments (I) be made on the date monthly installments are due, and (II) be in the amount of that part of one or more monthly installments which would be applicable to principal", in cl. (ix), substituted a semicolon for the final period, and added cl. (x), in para. (7), in subpara. (E), inserted "or in obligations, participations, securities, or other instruments of, or issued by, or fully guaranteed as to principal and interest by any other agency of the United States and a Federal credit union may issue and sell securities which are guaranteed pursuant to section 306(g) of the National Housing Act;", and added "(L) investments in obligations of, or issued by, any State or political subdivision thereof (including any agency, corporation, or instrumentality of a State or political subdivision), except that no credit union may invest more than 10 per centum of its unimpaired capital and surplus in the obligations of any one issuer (exclusive of general obligations of the issuer); and", in para. (8), inserted "or in banks or institutions the accounts of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation,", and in para. (12), substituted ", money orders, and other similar money transfer instruments" for "and money orders" and substituted a semicolon for "which does not exceed the direct and indirect costs incident to providing such service;"

1983. Act Jan. 12, 1983, in para. (5)(A)(i), substituted "Administration" for "Association", in para. (7), deleted "and" before "(J)", substituted "(K)" for "(L)", and substituted a concluding period for "; and".

1984. Act Oct. 3, 1984 redesignated former para. (15) as para. (16); and added a new para. (15).

Act Oct. 17, 1984, in para. (5)(A), substituted cl. (ii) for one which read: "a loan to finance the purchase of a mobile home, which shall be secured by a first lien on such mobile home, to be used by the credit union member as his residence, or a second mortgage loan secured by a residential dwelling which is the residence of a credit union member shall have a maturity not to exceed fifteen years unless such loan is insured or guaranteed as provided in subparagraph (iii);"

1987. Act Aug. 10, 1987, in para. (5)(A)(ii), substituted "15 years or any longer term which the Board may allow;" for "fifteen years unless such loan is insured or guaranteed as provided in subparagraph (iii);", and, in para. (6), added ", representing equity,"

1989. Act Nov. 28, 1989 redesignated para. (16) as para. (17); and added new para. (16).

1994. Act Sept. 23, 1994, in para. (15), in subpara. (A), deleted "or" after the concluding semicolon, in subpara. (B), inserted "or" after the concluding semicolon, and added subpara. (C).

1996. Act Sept. 30, 1996, in para. (5)(A), in cls. (iv) and (v), substituted "\$ 20,000" for "\$ 10,000".

2006. Act Oct. 13, 2006, in para. (5), in the introductory matter, substituted "15 years," for "twelve years", and in subpara. (E), substituted the concluding semicolon for a period, in para. (6), in the concluding matter, substituted the concluding period for a semicolon, in para. (7), deleted "the Federal Savings and Loan Insurance Corporation or" following "insured by" in subpara. (D), substituted "the Federal Housing Finance Board," for "the Federal Home Loan Bank Board," in subpara. (E), and substituted the concluding period for a semicolon, in para. (9), substituted "title III" for

"subchapter III", substituted para. (12) for one which read: "(12) in accordance with rules and regulations prescribed by the Board, to sell to members negotiable checks (including travelers checks), money orders, and other similar money transfer instruments, and to cash checks and money orders for members, for a fee;", and, in para. (13), deleted "and" following the concluding semicolon.

2010. Act July 21, 2010 (effective 1 day after enactment, as provided by § 4 of such Act, which appears as *12 USCS § 5301* note), substituted para. (12) for one which read:

"(12) in accordance with regulations prescribed by the Board--

"(A) to sell, to persons in the field of membership, negotiable checks (including travelers checks), money orders, and other similar money transfer instruments (including international and domestic electronic fund transfers); and

"(B) to cash checks and money orders and receive international and domestic electronic fund transfers for persons in the field of membership for a fee;".

Redesignation:

This section, formerly § 7 of Act June 26, 1934, ch 750, was redesignated by Act Sept. 22, 1959, P.L. 86-354, § 1, 73 Stat. 630, as § 8 of such Act June 26, 1934.

This section, formerly redesignated as § 8 of Act June 26, 1934, ch 750, was redesignated by Act Oct. 19, 1970, P.L. 91-468, § 1(2), 84 Stat. 994, as § 107 of such Act June 26, 1934.

Transfer of functions:

For transfer of functions of the Farm Credit Administration and the Governor thereof to the Federal Deposit Insurance Corporation by Reorg. Plan No. 1 of 1947, see *12 USCS § 1751* note.

Other provisions:

Effective date and application of amendment made by Act July 5, 1968. For effective date and application of 1968 amendment, see § 808 of such Act, which appears as *12 USCS § 1716b* note.

Effective date and application of amendments made by Act Nov. 10, 1978. For effective date and application of 1978 amendments, see Other provisions note which appears at *12 USCS § 1752*.

Application of amendment made by Act Dec. 21, 1979. For application of Dec. 21, 1979 amendment, see Other provisions note which appears at *12 USCS § 1728*.

NOTES:

Code of Federal Regulations:

National Credit Union Administration--Definitions, *12 CFR 700.1* et seq.

National Credit Union Administration--Organization and operation of Federal credit unions, *12 CFR 701.1* et seq.

National Credit Union Administration--Investment and deposit activities, *12 CFR 703.1* et seq.

National Credit Union Administration--Corporate credit unions, *12 CFR 704.1* et seq.

National Credit Union Administration--Involuntary liquidation of Federal credit unions and adjudication of creditor claims involving Federally insured credit unions in liquidation, *12 CFR 709.0* et seq.

National Credit Union Administration--Management official interlocks, *12 CFR 711.1* et seq.

National Credit Union Administration--Credit union service organizations (CUSOs), *12 CFR 712.1* et seq.

National Credit Union Administration--Leasing, *12 CFR 714.1* et seq.

National Credit Union Administration--Incidental powers, *12 CFR 721.1* et seq.

National Credit Union Administration--Appraisals, *12 CFR 722.1* et seq.

National Credit Union Administration--Member business loans, *12 CFR 723.1* et seq.

National Credit Union Administration--Trustees and custodians of certain tax-advantaged savings plans, *12 CFR 724.1* et seq.

12 USCS § 1757

National Credit Union Administration--National Credit Union Administration central liquidity facility, *12 CFR 725.1* et seq.

National Credit Union Administration--Requirements for insurance, *12 CFR 741.0* et seq.

National Credit Union Administration--Regulatory flexibility program, *12 CFR 742.1* et seq.

National Credit Union Administration--Share insurance and appendix, *12 CFR 745.0* et seq.

National Credit Union Administration--Loans in areas having special flood hazards, *12 CFR 760.1* et seq.

Related Statutes & Rules:

Discounts and loans of Federal Intermediate credit banks, *12 USCS § 1431*.

Shares or accounts of Federal savings associations, *12 USCS § 1464*.

Enforcement of consumer credit disclosure requirements imposed under *15 USCS §§ 1601* et seq. *15 USCS § 1607*.

This section is referred to in *12 USCS §§ 1752, 1761c*.

Research Guide:

Federal Procedure:

4B Fed Proc L Ed, Banking and Financing § 8:1280.

Am Jur:

10 Am Jur 2d, Banks and Financial Institutions §§ 561, 563-575.

Commercial Law:

1 Debtor-Creditor Law (Matthew Bender), ch 6, The Cost of Credit § 6.02.

Texts:

1 Banking Law (Matthew Bender), ch 1, Introduction to Banking Law § 1.05.

5 Banking Law (Matthew Bender), ch 112, Characteristics of Checks and Other Negotiable Instruments § 112.02.

9 Banking Law (Matthew Bender), ch 172, Application Evaluation § 172.02.

Interpretive Notes and Decisions:

1. Generally 2. Jurisdiction 3. Effect of state usury laws 4. Investment of funds 5. Incidental powers 6. Miscellaneous

1. Generally

Any judicial construction of *12 USCS § 1757* must account for interpretations of statute made by National Credit Union Administration. *LTV Federal Credit Union v UMIC Government Secur., Inc. (1981, ND Tex) 523 F Supp 819, CCH Fed Secur L Rep P 98334, 33 UCCRS 669, affd (1983, CA5 Tex) 704 F2d 199, CCH Fed Secur L Rep P 99193, cert den (1983) 464 US 852, 104 S Ct 163, 78 L Ed 2d 149*.

2. Jurisdiction

Federal diversity jurisdiction extended to action by New York corporation against federal credit union limited by charter to doing localized business in New Jersey. *Feuchtwanger Corp. v Lake Hiawatha Federal Credit Union (1959, CA3 NJ) 272 F2d 453*.

Federal Credit Union Act (FCUA), 12 USCS § 1757, confers on federal credit unions power to sue and be sued, but FCUA nowhere gives federal credit unions ability to sue and be sued in federal court. *Sly v DFCU (2006, ED Mich) 443 F Supp 2d 885*.

3. Effect of state usury laws

Interest rate ceiling imposed upon federal credit unions under 12 USCS § 1757 pre-empts inconsistent state interest rate limitation period. *Neal v Redstone Federal Credit Union (1984, Ala Civ App) 447 So 2d 805*.

Federal credit unions resemble national banks in that they are not subject to state usury laws, and credit union, as creature of Federal Government, existing under powers of Federal Credit Union Act, 12 USCS §§ 1751 et seq., is exempt from Georgia laws restricting amount of interest. *Christian v Atlanta Army Depot Federal Credit Union (1976) 140 Ga App 277, 231 SE2d 7, cert dismd (1977) 238 Ga 593, 234 SE2d 534*.

Federal credit union is not subject to usury laws of state of New York, where its office is located. *Brooklyn Jenapo Federal Credit Union v Schucher (1963) 41 Misc 2d 368, 245 NYS2d 637*.

12 USCS § 1757 governs rate of interest that may be charged on loan made by federal credit union, and conflicting state statute governing interest rates has no application. *McAnally v Ideal Federal Credit Union (1967, Okla) 428 P2d 322*.

12 USCS § 1757 authorizes federally chartered employees' credit union to charge interest of 1 percent per month, regardless of state usury laws. *Van Pelt v P. & L. Federal Credit Union (1955) 39 Tenn App 363, 282 SW2d 794; Birdwhistell v Y-12 Employees Federal Credit Union (1967) 57 Tenn App 621, 422 SW2d 896*.

4. Investment of funds

12 USCS § 1757(8)(A) [now 12 USCS § 1757(7)(A)] does not prohibit federal credit union from performing its contract to lend, which would be specifically enforceable where borrower's remedy at law is inadequate, nor does statute prohibit completion of executory loan agreement with estate of member. *Cuna Mut. Ins. Soc'y v Dominguez (1969) 9 Ariz App 172, 450 P2d 413*.

In determining whether state excise tax on net operating income, where operating expenses are allowed as deduction from net operating income, payments of interest to Federal credit unions are payments of interest to creditors which are includible in operating expenses or are dividends to investors which are not includible in operating expenses, language of 12 USCS § 1464(a) indicates that purpose of Federal savings and loan institutions is to provide institutions in which people may invest funds and provision in 12 USCS § 1757(8)(D) [now 12 USCS § 1757(7)(D)] authorizing Federal credit unions to invest in shares or accounts of Federal savings and loan associations indicate that periodic payments of interest are more analogous to dividends paid to investors and are not includible in operating expenses. *First Federal Sav. & Loan Asso. v State Tax Com. (1977) 372 Mass 478, 363 NE2d 474, affd (1978) 437 US 255, 57 L Ed 2d 187, 98 S Ct 2333*.

5. Incidental powers

By clear implication credit union possesses under 12 USCS § 1757 incidental power to endorse and deposit checks and drafts it acquires. *King Edward Employees Federal Credit Union v Travelers Indem. Co. (1953, CA5 Fla) 206 F2d 726*.

Activity of Federal Credit Union is within its "incidental powers" under 12 USCS § 1757(15) [now 12 USCS § 1757(17)] if it is convenient or useful in connection with one of its express powers; use of share drafts, which are simply variation of accessing members' accounts, similar to previous procedures valid as part of FCU's incidental powers, is within FCU's authority, despite congressional failure to specifically address share draft issue. *American Bankers Asso. v Connell (1978, DC Dist Col) 447 F Supp 296, vacated without op (1979, App DC) 194 US App DC 80, 595 F2d 887, cert den (1979) 444 US 920, 62 L Ed 2d 176, 100 S Ct 240 and vacated without op (1979, App DC) 194 US App DC 80, 595 F2d 887 and vacated without op (1979, App DC) 194 US App DC 81, 595 F2d 888 and revd on other grounds (1979, App DC) 222 US App DC 327, 686 F2d 953*.

Although 12 USCS § 1757 is silent on whether contracts to purchase Government National Mortgage Association securities may be in form of standby commitment or any other arrangement permitting future delivery, such contract is authorized where it is arguably within literal ambit of § 1757 and National Credit Union Administration permits such investment. *LTV Federal Credit Union v UMIC Government Secur., Inc. (1981, ND Tex) 523 F Supp 819, CCH Fed*

12 USCS § 1757

Secur L Rep P 98334, 33 UCCRS 669, affd (1983, CA5 Tex) 704 F2d 199, CCH Fed Secur L Rep P 99193, cert den (1983) 464 US 852, 104 S Ct 163, 78 L Ed 2d 149.

Credit union has such incidental powers as are necessary or requisite to enable it to carry on effectively business for which it is incorporated; ratification by board of previously unauthorized acts is incidental power which may be exercised to bring assignment into conformity with regulatory requirements. *Jackson v Nangle (1984, Alaska) 677 P2d 242.*

6. Miscellaneous

For purposes of priority payout schedule, holder of share certificates in federal credit union that had been placed into involuntary liquidation by National Credit Union Administration was equity holder rather than creditor. *Sisters of Presentation of Blessed Virgin Mary v National Credit Union Admin. Bd. (1992, CA8) 961 F2d 733.*

Because 12 USCS § 1757(11) grants to federal credit union not automatic lien but rather merely power to impose such lien, any lien obtained under authority of such statutory provision could only constitute security interest rather than statutory lien. *Muhammad v Pittsburgh Teachers Credit Union (In re Muhammad) (2004, BC WD Pa) 314 BR 546.*

Credit union's lien was perfected under Federal law by virtue of its insertion in Note of its intent to impress lien on all permissible accounts of debtor; and, under Florida law by virtue of contractual pledge. Federal credit union could apply pre-petition funds on deposit to offset mutual debt based upon either debtor's contractual pledge of those funds or statutory lien granted by Federal Credit Union Act, notwithstanding that debtor had claimed deposits as exempt. *In re Cabrera (2009, BC SD Fla) 22 FLW Fed B 294.*

LEXSTAT 12 CFR 701.21

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*** THIS SECTION IS CURRENT THROUGH THE JANUARY 23, 2008 ISSUE OF ***
 *** THE FEDERAL REGISTER ***

TITLE 12 -- BANKS AND BANKING
 CHAPTER VII -- NATIONAL CREDIT UNION ADMINISTRATION
 SUBCHAPTER A -- REGULATIONS AFFECTING CREDIT UNIONS
 PART 701 -- ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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12 CFR 701.21

§ 701.21 Loans to members and lines of credit to members.

(a) Statement of scope and purpose. Part 712 complements the provisions of section 107(5) of the Federal Credit Union Act (*12 U.S.C. 1757(5)*) authorizing Federal credit unions to make loans to members and issue lines of credit (including credit cards) to members. Section 107(5) of the Act contains limitations on matters such as loan maturity, rate of interest, security, and prepayment penalties. Section 701.21 interprets and implements those provisions. In addition, § 701.21 states the NCUA Board's intent concerning preemption of state laws, and expands the authority of Federal credit unions to enforce due-on-sale clauses in real property loans. Also, while § 701.21 generally applies to Federal credit unions only, its provisions may be used by state-chartered credit unions with respect to alternative mortgage transactions in accordance with *12 U.S.C. 3801* et seq., and certain provisions apply to loans made by federally insured state-chartered credit unions as specified in § 741.203 of this chapter. Part 722 of this chapter sets forth requirements for appraisals for certain real estate secured loans made under § 701.21 and any other applicable lending authority. Finally, it is noted that § 701.21 does not apply to loans by Federal credit unions to other credit unions (although certain statutory limitations in section 107 of the Act apply), nor to loans to credit union organizations which are governed by section 107(5)(D) of the Act and § 701.27 of this chapter.

(b) Relation to other laws -- (1) Preemption of state laws. Section 701.21 is promulgated pursuant to the NCUA's Board's exclusive authority as set forth in section 107(5) of the Federal Credit Union Act (*12 U.S.C. 1757(5)*) to regulate the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit (including credit cards) to members. This exercise of the Board's authority preempts any state law purporting to limit or affect:

(i)(A) Rates of interest and amounts of finance charges, including:

- (1) The frequency or the increments by which a variable interest rate may be changed;
- (2) The index to which a variable interest rate may be tied;
- (3) The manner or timing of notifying the borrower of a change in interest rate;
- (4) The authority to increase the interest rate on an existing balance;

(B) Late charges; and

(C) Closing costs, application, origination, or other fees;

(ii) Terms of repayment, including:

- (A) The maturity of loans and lines of credit;

(B) The amount, uniformity, and frequency of payments, including the accrual of unpaid interest if payments are insufficient to pay all interest due;

(C) Balloon payments; and

(D) Prepayment limits;

(iii) Conditions related to:

(A) The amount of the loan or line of credit;

(B) The purpose of the loan or line of credit;

(C) The type or amount of security and the relation of the value of the security to the amount of the loan or line of credit;

(D) Eligible borrowers; and

(E) The imposition and enforcement of liens on the shares of borrowers and accommodation parties.

(2) Matters not preempted. Except as provided by paragraph (b)(1) of this section, it is not the Board's intent to preempt state laws that do not affect rates, terms of repayment and other conditions described above concerning loans and lines of credit, for example:

(i) Insurance laws;

(ii) Laws related to transfer of and security interests in real and personal property (see, however, paragraph (g)(6) of this section concerning the use and exercise of due-on-sale clauses);

(iii) Conditions related to:

(A) Collection costs and attorneys' fees;

(B) Requirements that consumer lending documents be in "plain language;" and

(C) The circumstances in which a borrower may be declared in default and may cure default.

(3) Other Federal law. Except as provided by paragraph (b)(1) of this section, it is not the Board's intent to preempt state laws affecting aspects of credit transactions that are primarily regulated by Federal law other than the Federal Credit Union Act, for example, state laws concerning credit cost disclosure requirements, credit discrimination, credit reporting practices, unfair credit practices, and debt collection practices. Applicability of state law in these instances should be determined pursuant to the preemption standards of the relevant Federal law and regulations.

(4) Examination and enforcement. Except as otherwise agreed by the NCUA Board, the Board retains exclusive examination and administrative enforcement jurisdiction over Federal credit unions. Violations of Federal or applicable state laws related to the lending activities of a Federal credit union should be referred to the appropriate NCUA regional office.

(5) Definition of State law. For purposes of paragraph (b) of this section "state law" means the constitution, laws, regulations and judicial decisions of any state, the District of Columbia, the several territories and possessions of the United States, and the Commonwealth of Puerto Rico.

(c) General rules -- (1) Scope. The following general rules apply to all loans to members and, where indicated, all lines of credit (including credit cards) to members, except as otherwise provided in the remaining provisions of § 701.21.

(2) Written policies. The board of directors of each Federal credit union shall establish written policies for loans and lines of credit consistent with the relevant provisions of the Act, NCUA's regulations, and other applicable laws and regulations.

(3) Credit applications and overdrafts. Consistent with policies established by the board of directors, the credit committee or loan officer shall ensure that a credit application is kept on file for each borrower supporting the decision to make a loan or establish a line of credit. A credit union may advance money to a member to cover an account deficit without having a credit application from the borrower on file if the credit union has a written overdraft policy. The policy must: set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit un-

ion's ability to absorb losses; establish a time limit not to exceed forty-five calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; limit the dollar amount of overdrafts the credit union will honor per member; and establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts.

(4) Maturity. The maturity of a loan to a member may not exceed 15 years. Lines of credit are not subject to a statutory or regulatory maturity limit. Amortization of line of credit balances and the type and amount of security on any line of credit shall be as determined by contract between the Federal credit union and the member/borrower.

(5) Ten percent limit. No loan or line of credit advance may be made to any member if such loan or advance would cause that member to be indebted to the Federal credit union upon loans and advances made to the member in an aggregate amount exceeding 10% of the credit union's total unimpaired capital and surplus. In the case of member business loans as defined in § 723.1 of this chapter, additional limitations apply as set forth in §§ 723.8 and 723.9 of this chapter.

(6) Early payment. A member may repay a loan, or outstanding balance on a line of credit, prior to maturity in whole or in part on any business day without penalty.

(7) Loan interest rates -- (i) General. Except when the Board establishes a higher maximum rate, federal credit unions may not extend credit to members at rates exceeding 15 percent per year on the unpaid balance inclusive of all finance charges. Federal credit unions may use variable rates of interest but only if the effective rate over the term of a loan or line of credit does not exceed the maximum permissible rate.

(ii) Temporary rates. (A) At least every 18 months, the Board will determine if federal credit unions may extend credit to members at an interest rate exceeding 15 percent. After consultation with appropriate congressional committees, the Department of Treasury, and other federal financial institution regulatory agencies, the Board may establish a rate exceeding the 15 percent per year rate, if it determines money market interest rates have risen over the preceding six-month period and prevailing interest rate levels threaten the safety and soundness of individual federal credit unions as evidenced by adverse trends in liquidity, capital, earnings, and growth.

(B) When the Board establishes a higher maximum rate, the Board will provide notice to federal credit unions of the adjusted rate by issuing a Letter to Federal Credit Unions, as well as providing information in other NCUA publications and in a statement for the press.

(C) Federal credit unions may continue to charge rates exceeding the established maximum rate only on existing loans or lines of credit made before the effective date of any lowering of the maximum rate.

(8)(i) Except as otherwise provided herein, no official or employee of a Federal credit union, or immediate family member of an official or employee of a Federal credit union, may receive, directly or indirectly, any commission, fee, or other compensation in connection with any loan made by the credit union.

(ii) For the purposes of this section:

Compensation includes non monetary items, except those of nominal value.

Immediate family member means a spouse or other family member living in the same household.

Loan includes line of credit.

Official means any member of the board of directors or a volunteer committee.

Person means an individual or an organization.

Senior management employee means the credit union's chief executive officer (typically, this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g., Assistant President, Vice President, or Assistant Treasurer/Manager), and the chief financial officer (Comptroller).

Volunteer official means an official of a credit union who does not receive compensation from the credit union solely for his or her service as an official.

(iii) This section does not prohibit:

(A) Payment, by a Federal credit union, of salary to employees;

(B) Payment, by a Federal credit union, of an incentive or bonus to an employee based on the credit union's overall financial performance;

(C) Payment, by a Federal credit union, of an incentive or bonus to an employee, other than a senior management employee, in connection with a loan or loans made by the credit union, provided that the board of directors of the credit union establishes written policies and internal controls in connection with such incentive or bonus and monitors compliance with such policies and controls at least annually.

(D) Receipt of compensation from a person outside a Federal credit union by a volunteer official or non senior management employee of the credit union, or an immediate family member of a volunteer official or employee of the credit union, for a service or activity performed outside the credit union, provided that no referral has been made by the credit union or the official, employee, or family member.

(d) Loans and lines of credit to officials -- (1) Purpose. Sections 107(5)(A) (iv) and (v) of the Act require the approval of the board of directors of the Federal credit union in any case where the aggregate of loans to an official and loans on which the official serves as endorser or guarantor exceeds \$ 20,000 plus pledged shares. This paragraph implements the requirement by establishing procedures for determining whether board of directors's approval is required. The section also prohibits preferential treatment of officials.

(2) Official. An "official" is any member of the board of directors, credit committee or supervisory committee.

(3) Initial approval. All applications for loans or lines of credit on which an official will be either a direct obligor or an endorser, cosigner or guarantor shall be initially acted upon by either the board of directors, the credit committee or a loan officer, as specified in the Federal credit union's bylaws.

(4) Board of Directors' review. The board of directors shall, in any case, review and approve or deny an application on which an official is a direct obligor, or endorser, cosigner or guarantor if the following computation produces a total in excess of \$ 20,000:

(i) Add:

(A) The amount of the current application.

(B) The outstanding balances of loans, including the used portion of an approved line of credit, extended to or endorsed, cosigned or guaranteed by the official.

(C) The total unused portion of approved lines of credit extended to or endorsed, cosigned or guaranteed by the official.

(ii) From the above total subtract:

(A) The amount of shares pledged by the official on loans or lines of credit extended to or endorsed, cosigned or guaranteed by the official.

(B) The amount of shares to be pledged by the official on the loan or line of credit applied for.

(5) Nonpreferential treatment. The rates, terms and conditions on any loan or line of credit either made to, or endorsed or guaranteed by --

(i) An official,

(ii) An immediate family member of an official, or

(iii) Any individual having a common ownership, investment or other pecuniary interest in a business enterprise with an official or with an immediate family member of an official,

shall not be more favorable than the rates, terms and conditions for comparable loans or lines of credit to other credit union members. "Immediate family member" means a spouse or other family member living in the same household.

(e) Insured, Guaranteed and Advance Commitment Loans. A loan secured, in full or in part, by the insurance or guarantee of, or with an advance commitment to purchase the loan, in full or in part, by the Federal Government, a State government or any agency of either, may be made for the maturity and under the terms and conditions, including rate of interest, specified in the law, regulations or program under which the insurance, guarantee or commitment is provided.

(f) 20-Year Loans. (1) Notwithstanding the general 15-year maturity limit on loans to members, a federal credit union may make loans with maturities of up to 20 years in the case of:

(i) a loan to finance the purchase of a mobile home if the mobile home will be used as the member-borrower's residence and the loan is secured by a first lien on the mobile home, and the mobile home meets the requirements for the home mortgage interest deduction under the Internal Revenue Code,

(ii) a second mortgage loan (or a nonpurchase money first mortgage loan in the case of a residence on which there is no existing first mortgage) if the loan is secured by a residential dwelling which is the residence of the member-borrower, and

(iii) a loan to finance the repair, alteration, or improvement of a residential dwelling which is the residence of the member-borrower.

(2) For purposes of this paragraph (f), mobile home may include a recreational vehicle, house trailer or boat.

(g) Long-Term Mortgage Loans. (1) Authority. A federal credit union may make residential real estate loans to members, including loans secured by manufactured homes permanently affixed to the land, with maturities of up to 40 years, or such longer period as may be permitted by the NCUA Board on a case-by-case basis, subject to the conditions of this paragraph (g).

(2) Statutory limits. The loan shall be made on a one to four family dwelling that is or will be the principal residence of the member-borrower and the loan shall be secured by a perfected first lien in favor of the credit union on such dwelling (or a perfected first security interest in the case of either a residential cooperative or a leasehold or ground rent estate).

(3) Loan application. The loan application shall be a completed standard Federal Housing Administration, Veterans Administration, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association or Federal Home Loan Mortgage Corporation/Federal National Mortgage Association application form. In lieu of use of a standard application the Federal credit union may have a current attorney's opinion on file stating that the forms in use meet the requirements of applicable Federal, state and local laws.

(4) Security instrument and note. The security instrument and note shall be executed on the most current version of the FHA, VA, FHLMC, FNMA, or FHLMC/FNMA Uniform Instruments for the jurisdiction in which the property is located. No prepayment penalty shall be allowed, although a Federal credit union may require that any partial prepayments be made on the date monthly installments are due and be in the amount of that part of one or more monthly installments that would be applicable to principal. In lieu of use of a standard security instrument and note, the Federal credit union may have a current attorney's opinion on file stating that the security instrument and note in use meet the requirements of applicable Federal, state and local laws.

(5) First lien, territorial limits. The loan shall be secured by a perfected first lien or first security interest in favor of the credit union supported by a properly executed and recorded security instrument. No loan shall be secured by a residence located outside the United States of America, its territories and possessions, or the Commonwealth of Puerto Rico.

(6) Due-on-sale clauses. (i) Except as otherwise provided herein, the exercise of a due-on-sale clause by a Federal credit union is governed exclusively by section 341 of Pub. L. 97-320 and by any regulations issued by the Federal Home Loan Bank Board implementing section 341.

(ii) In the case of a contract involving a long-term (greater than fifteen years), fixed rate first mortgage loan which was made or assumed, including a transfer of the lien property subject to the loan, during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such state has rendered a decision (or if the highest court has not so decided, the date on which the next highest court has rendered a decision resulting in a final judgment if such decision applies statewide) prohibiting such exercise, and ending on October 15, 1982, a Federal credit union may exercise a due-on-sale clause in the case of a transfer which occurs on or after November 18, 1982, unless exercise of the due-on-sale clause would be based on any of the following:

(A) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(B) The creation of a purchase money security interest for household appliances;

(C) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(D) The granting of a leasehold interest of 3 years or less not containing an option to purchase;

(E) A transfer to a relative resulting from the death of a borrower;

(F) A transfer where the spouse or children of the borrower become an owner of the property;

(G) A transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(H) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or

(I) Any other transfer or disposition described in regulations promulgated by the Federal Home Loan Bank Board.

(7) Assumption of real estate loans by nonmembers. A federal credit union may permit a nonmember to assume a member's mortgage loan in conjunction with the nonmember's purchase of the member's principal residence, provided that the nonmember assumes only the remaining unpaid balance of the loan, the terms of the loan remain unchanged, and there is no extension of the original maturity date specified in the loan agreement with the member. An assumption is impermissible if the original loan was made with the intent of having a nonmember assume the loan.

(h) Third-party servicing of indirect vehicle loans. (1) A federally-insured credit union must not acquire any vehicle loan, or any interest in a vehicle loan, serviced by a third-party servicer if the aggregate amount of vehicle loans and interests in vehicle loans serviced by that third-party servicer and its affiliates would exceed:

(i) 50 percent of the credit union's net worth during the initial thirty months of that third-party servicing relationship; or

(ii) 100 percent of the credit union's net worth after the initial thirty months of that third-party servicing relationship.

(2) Regional directors may grant a waiver of the limits in paragraph (h)(1) of this section to permit greater limits upon written application by a credit union. In determining whether to grant or deny a waiver, a regional director will consider:

(i) The credit union's understanding of the third-party servicer's organization, business model, financial health, and the related program risks;

(ii) The credit union's due diligence in monitoring and protecting against program risks;

(iii) If contracts between the credit union and the third-party servicer grant the credit union sufficient control over the servicer's actions and provide for replacing an inadequate servicer; and

(iv) Other factors relevant to safety and soundness.

(3) A regional director will provide a written determination on a waiver request within 45 calendar days after receipt of the request; however, the 45-day period will not begin until the requesting credit union has submitted all necessary information to the regional director. If the regional director does not provide a written determination within the 45-day period the request is deemed denied. A credit union may appeal any part of the determination to the NCUA Board. Appeals must be submitted through the regional director within 30 days of the date of the determination.

(4) For purposes of paragraph (h) of this section:

(i) The term "third-party servicer" means any entity, other than a federally-insured depository institution or a wholly-owned subsidiary of a federally-insured depository institution, that receives any scheduled, periodic payments from a borrower pursuant to the terms of a loan and distributes payments of principal and interest and any other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. The term also excludes any servicing entity that meets the following three requirements:

(A) Has a majority of its voting interests owned by federally-insured credit unions;

(B) Includes in its servicing agreements with credit unions a provision that the servicer will provide NCUA with complete access to its books and records and the ability to review its internal controls as deemed necessary by NCUA in carrying out NCUA's responsibilities under the Act; and

(C) Has its credit union clients provide a copy of the servicing agreement to their regional directors.

(ii) The term "its affiliates," as it relates to the third-party servicer, means any entities that:

(A) Control, are controlled by, or are under common control with, that third-party servicer; or

(B) Are under contract with that third-party servicer or other entity described in paragraph (h)(4)(ii)(A) of this section.

(iii) The term "vehicle loan" means any installment vehicle sales contract or its equivalent that is reported as an asset under generally accepted accounting principles. The term does not include:

(A) Loans made directly by a credit union to a member, or

(B) Loans in which neither the third-party servicer nor any of its affiliates are involved in the origination, underwriting, or insuring of the loan or the process by which the credit union acquires its interest in the loan.

(iv) The term "net worth" means the retained earnings balance of the credit union at quarter end as determined under generally accepted accounting principles. For low income-designated credit unions, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders, and the National Credit Union Share Insurance Fund.

(i) Put option purchases in managing increased interest-rate risk for real estate loans produced for sale on the secondary market --

(1) Definitions. For purposes of § 701.21(i): (i) Financial options contract means an agreement to make or take delivery of a standardized financial instrument upon demand by the holder of the contract at any time prior to the expiration date specified in the agreement, under terms and conditions established either by:

(A) A contract market designated for trading such contracts by the Commodity Futures Trading Commission, or

(B) By a Federal credit union and a primary dealer in Government securities that are counterparties in an over-the-counter transaction.

(ii) FHLMC security means obligations or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or 306 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454 and 1455).

(iii) FNMA security means an obligation, participation, or any instrument of or issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association.

(iv) GNMA security means an obligation, participation, or any instrument of or issued by, or fully guaranteed as to principal and interest by, the Government National Mortgage Association.

(v) Long position means the holding of a financial options contract with the option to make or take delivery of a financial instrument.

(vi) Primary dealer in Government securities means:

(A) A member of the Association of Primary Dealers in United States Government Securities; or

(B) Any parent, subsidiary, or affiliated entity of such primary dealer where the member guarantees (to the satisfaction of the FCU's board of directors) over-the-counter sales of financial options contracts by the parent, subsidiary, or affiliated entity to a Federal credit union.

(vii) Put means a financial options contract which entitles the holder to sell, entirely at the holder's option, a specified quantity of a security at a specified price at any time until the stated expiration date of the contract.

(2) Permitted options transactions. A Federal credit union may, to manage risk of loss through a decrease in value of its commitments to originate real estate loans at specified interest rates, enter into long put positions on GNMA, FNMA, and FHLMC securities:

(i) If the real estate loans are to be sold on the secondary market within ninety (90) days of closing;

(ii) If the positions are entered into:

(A) Through a contract market designated by the Commodity Futures Trading Commission for trading such contracts, or

(B) With a primary dealer in Government securities;

(iii) If the positions are entered into pursuant to written policies and procedures which are approved by the Federal credit union's board of directors, and include, at a minimum:

(A) The Federal credit union's strategy in using financial options contracts and its analysis of how the strategy will reduce sensitivity to changes in price or interest rates in its commitments to originate real estate loans at specified interest rates;

(B) A list of brokers or other intermediaries through which positions may be entered into;

(C) Quantitative limits (e.g., position and stop loss limits) on the use of financial options contracts;

(D) Identification of the persons involved in financial options contract transactions, including a description of these persons' qualifications, duties, and limits of authority, and description of the procedures for segregating these persons' duties,

(E) A requirement for written reports for review by the Federal credit union's board of directors at its monthly meetings, or by a committee appointed by the board on a monthly basis, of:

(1) The type, amount, expiration date, correlation, cost of, and current or projected income or loss from each position closed since the last board review, each position currently open and current gains or losses from such positions, and each position planned to be entered into prior to the next board review;

(2) Compliance with limits established on the policies and procedures; and

(3) The extent to which the positions described contributed to reduction of sensitivity to changes in prices or interest rates in the Federal credit union's commitments to originate real estate loans at a specified interest rate; and

(iv) If the Federal credit union has received written permission from the appropriate NCUA Regional Director to engage in financial options contracts transactions in accordance with this § 701.21(i) and its policies and procedures as written.

(3) Recordkeeping and reporting. (i) The reports described in § 701.21(i)(2)(iii)(E) for each month must be submitted to the appropriate NCUA Regional Office by the end of the following month. This monthly reporting requirement may be waived by the appropriate NCUA Regional Director on a case-by-case basis for those Federal credit unions with a proven record of responsible use of permitted financial options contracts.

(ii) The records described in § 701.21(i)(2)(iii)(E) must be retained for two years from the date the financial options contracts are closed.

(4) Accounting. A federal credit union must account for financial options contracts transactions in accordance with generally accepted accounting principles.

HISTORY: [49 FR 30685, Aug. 1, 1984, as amended at 52 FR 12368, Apr. 16, 1987; 54 FR 18472, May 1, 1989; 54 FR 43278, Oct. 24, 1989; 55 FR 30207, July 25, 1990; 56 FR 37831, Aug. 9, 1991; 56 FR 48425, Sept. 25, 1991; 57 FR 42488, Sept. 15, 1992; 58 FR 6077, Jan. 26, 1993; 58 FR 40043, July 27, 1993; 59 FR 39425, Aug. 3, 1994; 60 FR 51886, 51889, Oct. 4, 1995; 60 FR 58502, 58504, Nov. 28, 1995, as corrected at 60 FR 63613, Dec. 12, 1995; 61 FR 4213, 4214, Feb. 5, 1996; 61 FR 68127, 68128, Dec. 27, 1996; 62 FR 40928, 40930, July 31, 1997; 63 FR 51793, 51799, Sept. 29, 1998, as confirmed at 64 FR 28721, 28729, May 27, 1999; 63 FR 71213, 71214, Dec. 24, 1998; 64 FR 5927, 5929, Feb. 8, 1999; 64 FR 57363, 57365, Oct. 25, 1999; 65 FR 15224, 15226, Mar. 22, 2000; 65 FR 44974, 44977, July 20, 2000; 67 FR 7057, 7059, Feb. 15, 2002; 68 FR 46439, 46441, Aug. 6, 2003; 69 FR 27827, 27828, May 17, 2004; 70 FR 3861, 3863, Jan. 27, 2005; 70 FR 8921, 8923, Feb. 24, 2005; 71 FR 36661, 36666, June 28, 2006; 71 FR 42249, 42251, July 26, 2006; 71 FR 62875, 62876, Oct. 27, 2006, as confirmed and amended at 72 FR 7927, 7928, Feb. 22, 2007; 72 FR 30245, 30246, May 31, 2007]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

NOTES: [EFFECTIVE DATE NOTE: 71 FR 36661, 36666, June 28, 2006, added paragraph (h), effective July 28, 2006; 71 FR 42249, 42251, July 26, 2006, revised paragraphs (c)(7)(i) and (c)(7)(ii), effective Sept. 9, 2006; 71 FR 62875, 62876, Oct. 27, 2006, amended paragraphs (c)(4) and (f), effective Oct. 27, 2006; 72 FR 7927, 7928, Feb. 22, 2007, amended paragraph (g)(6)(ii), effective Mar. 26, 2007; 72 FR 30245, 30246, May 31, 2007, amended paragraph (a), and the introductory text of paragraph (i)(1), effective May 31, 2007.]

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Farmers Home Administration: See Agriculture, 7 CFR, chapter XVIII.

Office of Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development: See Housing and Urban Development, 24 CFR, chapter II.

Fiscal Service: See Money and Finance: Treasury, 31 CFR, chapter II.

Monetary Offices: See Money and Finance: Treasury, 31 CFR, chapter I.

Commodity Credit Corporation: See Agriculture, 7 CFR, chapter XIV.

Small Business Administration: See Business Credit and Assistance, 13 CFR, chapter I.

Rural Electrification Administration: See Agriculture, 7 CFR, chapter XVII.

5087 words

LEXSEE 49 FED REG 30683

NATIONAL CREDIT UNION ADMINISTRATION
AGENCY: National Credit Union Administration ("NCUA").

12 CFR Part 701

Loans to Members and Lines of Credit to Members

49 FR 30683

August 1, 1984

ACTION: Final rule.

SUMMARY: The NCUA Board adopts revised regulations concerning Federal credit union ("FCU") loans to members and lines of credit to members. The revisions simplify NCUA's previous regulations on this subject. The regulations interpret and implement the provisions of the Federal Credit Union Act ("Act") related to interest rates, maturities and other terms and conditions of FCU lending activities. Important new provisions include an introductory section explaining the scope and purpose of the regulations and a section setting forth NCUA's position on the applicability of state laws affecting FCU lending activities.

EFFECTIVE DATE: September 1, 1984.

ADDRESS: National Credit Union Administration, 1776 G Street, N.W., Washington, D.C. 20456.
FOR FURTHER INFORMATION CONTACT: Robert M. Fenner, Director, or Bryan Rachlin, Attorney, Department of Legal Services at the above address. Telephone (202) 357-1030.

TEXT: SUPPLEMENTARY INFORMATION:

Background.

On November 18, 1983, the NCUA Board proposed revised rules concerning Federal credit union loans to members and lines of credit to members (*see, 48 FR 52475*). The proposal was developed pursuant to NCUA's program of regulatory review, and was designed to simplify, reorganize, and clarify NCUA's existing regulations, which had been put in place in a piecemeal fashion over the years as a result of various statutory changes in FCU lending authority.

The Board had requested comment on the proposal through March 16, 1984. A total of 43 comment letters were received. The comments were generally very favorable, and based on a review of those comments and further analysis, the Board has adopted these final rules.

The Board considered total deregulation but determined that regulations are needed for a number of reasons, including: Implementation of the provisions of Title III of Pub. L. 96-221 concerning the FCU loan interest rate ceiling; establishment of clear authority for FCU's to engage in certain types of lending such as variable rate loans and lines of credit and alternative mortgage loans; and clarification of the Board's position concerning preemption of state laws that would otherwise affect FCU lending activities.

The revised regulations are in seven sections. Section 701.21(a), entitled *Statement of Scope and Purpose*, explains that the regulations apply only to FCU loans and lines of credit *to members* (not loans to other credit unions and credit organizations) and that the regulations interpret and implement various provisions of the FCU Act. Section 701.21(b), entitled *Relation to Other Laws*, establishes rules for determining whether the Act and NCUA's regulations preempt state

laws that would otherwise apply to FCU lending activities. Section 701.21(c), entitled *General Rules*, sets forth provisions that have general applicability to loans and lines of credit to members such as the 12 year maturity limit and the loan interest rate ceiling. (By NCUA Board action on July 25, 1984, the temporary 21 percent loan interest rate ceiling was extended through January 25, 1986. The new expiration date is indicated in section 701.21(c) (7)). Section 701.21(d), entitled *Loans and Lines of Credit to Officials*, sets forth procedures for implementing the provisions of the Act that require board of directors' approval for certain loans and lines of credit to officials and contains a prohibition against preferential treatment of officials. Section 701.21(e), entitled *Insured, Guaranteed and Advance Commitment Loans* clarifies that statutory limits such as the 12 year maturity limit and the loan interest rate ceiling do not apply to loans made pursuant to programs of and with the backing of Federal, state or local government agencies. Such loans may be made to FCU members according to the terms of the relevant government program. Section 701.21(f), entitled *15 Year Loans*, clarifies that pursuant to the terms of the Act, certain mobile home and second mortgage loans may be made with maturities up to 15 years notwithstanding the general 12 year maturity limit. Section 701.21(g), entitled *Long Term Mortgage Loans*, implements the provisions of the Act authorizing long term first mortgage loans (both conventional and alternative mortgages) within certain statutory limits and safety and soundness considerations.

The substance of the final regulations by and large tracks the proposed revised regulations. The more significant changes in the final rule are discussed in greater detail below.

Summary of Substantive Changes

Section 701.21(b) Relation to other laws.

The proposed rule contained a general statement of NCUA's intent to preempt state laws affecting the rates, terms and conditions of loans and lines of credit to Federal credit union members. The proposal prompted many comments for further guidance from NCUA in the area of Federal preemption. Accordingly, NCUA has developed a more detailed explanation of its intent with respect to preemption of state laws. The general preemption language in the proposed rule has been deleted and a completely new preemption section has been placed in the final rule (Section 701.21(b), Relation to Other Laws). Section 701.21(b) is a five part explanation of the extent to which the Federal Credit Union Act and NCUA's regulations preempt other laws affecting loans and lines of credit offered by Federal credit unions.

Sections 701.21(b) (1)-(3) establish three "baskets" for preemption purposes:

First, pursuant to § 701.21(b)(1), provisions of state law affecting rates, terms of repayment and other conditions of FCU lending are preempted. This section sets forth a list of areas that are specifically preempted. Included are state laws affecting rate of interest amount of finance charge, use of and limits on variable rate credit, maturity limits and other terms of repayment, and various other conditions. It is noted that the list is exemplary only. It is not intended to be nor should it be considered exhaustive.

Second, § 701.21(b)(2) clarifies that certain areas of state law not affecting rate and terms of repayment are not preempted. Included are state laws concerning insurance, creation of security interests and property transfers. Also, certain areas that the FCU Act and NCUA's regulations traditionally have not addressed are not preempted, such as state imposed limits on collection costs and state law "plain English" requirements. This assumes, of course, in the case of state regulations that the regulatory body has received a proper legislative grant of jurisdiction over FCU's. Also, in the event of a conflict between this section and 701.21(b)(1), it is NCUA's intent that § 701.21(b)(1) will prevail.

Third, § 701.21(b)(3) clarifies that in those cases where a Federal law other than the FCU Act, for example the Federal Truth In Lending Act or the Federal Equal Credit Opportunity Act, establishes its own standards for determining preemption of state laws, FCU's should generally look to those standards in determining preemption issues. Again, however, if a conflict exists between this section and § 701.21(b)(1), it is the NCUA Board's intent that (b)(1) prevail. Thus, for example, if a state law or regulation imposes a stricter standard than the Federal Truth In Lending Act and Regulation Z for advance notification to the customer of a change in the rate on a variable rate account, that state requirement would be preempted by § 701.21(b)(i)(A)(3) which preempts state law limiting "the manner or timing of notifying the borrower of a change in interest rates." The FCU would, of course, continue to be required to meet all relevant notice and disclosure requirements of the Federal Truth In Lending Act and Regulation Z.

Section 701.21(b)(4) clarifies that, unless otherwise agreed, the NCUA Board retains exclusive examination and enforcement jurisdiction over FCU's. Section 701.21(b)(5) defines "state law" for purposes of § 701.21(b) to include the

constitution, laws, regulations and judicial decisions of any state, the District of Columbia, the several territories and possessions of the U.S., and the Commonwealth of Puerto Rico.

Loans and Lines of Credit Distinguished

The proposed rule used the term "loan" in a broad sense to encompass both loans and extensions of credit under a line of credit. Several commenters noted that this resulted in confusion over whether certain statutory requirements affecting loans also are intended by regulation to apply to lines of credit; for example, the general 12 year maturity limit and the collateral limits and other limits on longer term loans only apply, on the face of the statute, to loans. It was *not* the Board's intent to extend these limits by regulation to lines of credit. Thus, for example, a home equity-secured line of credit is not subject to statutory or regulatory limits on maturity and lien priority. To avoid confusion, the final rule has been revised so that any provisions that apply to both loans and lines of credit either specifically mention both or use the broader term "extension of credit."

The fact that the Board has chosen not to subject lines of credit to the statutory limits on maturity and collateralization should not be taken to mean that these considerations are unimportant. Rather, for any Federal credit union that offers lines of credit, it is the responsibility of the board of directors to establish lending policies that reflect careful consideration of the duration of lines of credit and the amount and type of collateral to be required.

Prohibited Fees

The vast majority of the commenters supported the provision of the proposed rule that would prohibit an official or employee of an FCU, or any immediate family member of such an individual, from receiving any fee, commission or other compensation in connection with procuring or insuring a loan or line of credit. The provision has been carried over in the final rule, at § 701.21(c)(8). As suggested by some commenters, a definition of "immediate family member" has been added. The term is defined as "a spouse, or child, parent, grandchild, grandparent, brother or sister, or the spouse of any such individual." This is the same definition used in a similar prohibition contained in NCUA's regulations concerning FCU investment activities (see *12 CFR 703.2(i)* and *703.4(e)*).

15 Year Loans

Section 107(5)(A)(ii) of the Act (*12 U.S.C. 1757(5)(A)(ii)*) authorizes certain second mortgage and mobile home loans to be made with maturities up to 15 years, notwithstanding the general 12 year maturity limit on other loans. NCUA's previous regulations have not addressed this authority. In order to improve the utility of the regulation, a section was added to the proposal explaining the authority. The commenters agreed and the explanation has been carried over in § 701.21(f) of the final rule. Also, as proposed, the regulation allows certain *first* mortgage loans with maturities of up to 15 years pursuant to this authority without regard to the additional statutory and regulatory limits affecting longer term (up to 40 years) first mortgages. Thus, where the member has no mortgage on the home the member currently resides in, a first mortgage home equity loan of up to 15 years may be made pursuant to this authority. To clarify the purpose of this authority, the relevant language of the final § 701.21(f) is limited to *nonpurchase money* first mortgages. The Board believes this additional authority is clearly consistent with the statutory purpose and will provide home equity loans to a greater number of members while affording equal or stronger security to the entire credit union. The Board considered it necessary to decline, however, to allow junior mortgages (3rd, 4th and so on) pursuant to this authority as suggested by some commenters. Such loans may of course be made, as authorized by the statute, with maturities of up to 12 years.

Long Term Mortgage Loans

Section 107(5)(A)(i) of the Act (*12 U.S.C. 1757(5)(A)(i)*) authorizes FCU's to make residential real estate loans to members with maturities up to 30 years or such longer periods as set by the NCUA Board) if certain conditions are met. NCUA's existing regulations have implemented this authority through two separate sections. Section 701.21-6 has implemented the authority for fixed rate mortgage loans, and § 701.21-6B has implemented the authority for adjustable rate mortgage loans. In the proposed rule, NCUA combined and suggested major simplification and other changes to these sections. The commenters supported these proposals, which have been adopted in the final rule at § 701.21(g) entitled *Long Term Mortgage Loans*. First, the section does not limit FCU's to fixed rate and adjustable rate mortgages. Thus, a full range of alternative mortgages are permitted so long as the FCU meets the statutory requirements, i.e., that

the loan be secured by a first lien on a one to four family dwelling that is or will be the principal residence of the member/borrower. Second, as proposed, virtually all of the restrictive requirements of the previous rules have been eliminated, e.g., provisions concerning amortization, percentage of assets limits, loan to value ratios, and interest rate adjustments (including choice of indexes). Also as proposed, the final rule specifically allows maturities of up to 40 years on long term first mortgage loans.

The final regulation contains one significant change from the proposal. The proposed regulation would have continued to require that FCU's use standard forms, developed by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, for all long term mortgage loans. This requirement was intended to ensure, in light of the relative newness of mortgage lending authority to FCU's and the substantial proposed deregulation of this authority, that FCU mortgage loans be made in a financially and legally sound manner. The commenters supported the intent of this proposal, but many suggested that it unnecessarily restricted FCU's, by precluding other standard applications, notes and security instruments (those developed by the Federal Housing Administration and the Veterans Administration for use in their loan programs) and by precluding FCU's from developing forms tailored to their particular locale and the needs of their membership. Accordingly the final rule has been revised to allow applications notes and security instruments that either (i) have been developed by FNMA, FHLMC, FHA or VA, or (ii) have been reviewed by legal counsel and are supported by a current opinion attesting to their compliance with relevant local, state and Federal laws.

Business Relationship With Mortgage Lender

NCUA's previous regulations contain a section authorizing, and setting limits on, FCU involvement with third party mortgage lenders for the purpose of making mortgage loans available to the FCU's members. NCUA proposed to repeal this regulation, thus allowing such activity to be governed by NCUA's less restrictive regulation concerning general group purchasing activities (12 CFR Part 721). The majority of commenters agreed with this proposal, and accordingly the provisions concerning business relationship with other mortgage lenders are not included in the final rule.

Loan Participation and Eligible Obligations

Finally, as proposed, the last two parts of NCUA's previous lending regulations, § 701.21-7 (Loan Participation) and § 701.21-8 (Purchase, Sale, and Pledge of Eligible Obligations), are unaffected by these final rules, with the exception of certain proposed conforming amendments and appropriate renumbering of the sections. In the interest of expediting the revision of the more important regulations, substantive review of these sections has been reserved for a later date.

Regulatory Procedures

Regulatory Flexibility Act

The NCUA Board hereby certifies that these final rules will not have a significant economic impact on a substantial number of small credit unions because the rules increase their management flexibility, increase their competitive position and reduce their paperwork burdens. Therefore, a Regulatory Flexibility Analysis is not required.

List of Subjects in 12 CFR Part 701

Credit Unions, Mortgages.

Authority: 12 U.S.C. 1757, 1766(a), and 1789(a)(11).

By the National Credit Union Administration Board on the 25th day of July, 1984.

Rosemary Brady,

Secretary of the Board.

PART 701 -- [AMENDED]

Accordingly, NCUA's rules and regulations are amended as follows:

1. Section 701.21 is added to read as follows:

§ 701.21 Loans to members and lines of credit to members.

(a) *Statement of scope and purpose.* This section complements the provisions of section 107(5) of the Federal Credit Union Act (12 U.S.C. 1757(5)) authorizing Federal credit unions to make loans to members and issue lines of credit (including credit cards) to members. Section 107(5) of the Act contains certain limitations on matters such as loan maturity, rate of interest, security, and prepayment penalties. The primary purpose of this section is to interpret and implement the provisions of the Act. In addition, this section states the NCUA Board's intent concerning preemption of state laws, and expands the authority of Federal credit unions to enforce due-on-sale clauses in real property loans. Also, while this section generally applies to Federal credit unions only, its provisions may be utilized by state chartered credit unions with respect to alternative mortgage transactions in accordance with Title VIII of Pub. L. 97-230. Finally, it is noted that this section does not apply to loans by Federal credit unions to other credit unions (although certain statutory limitations in section 107 of the Act apply), nor to loans to credit union organizations (which are governed by section 107(5)(D) of the Act and § 701.27 of NCUA's regulations).

(b) *Relation to other laws.* -- (1) *Preemption of state laws.* Section 701.21 is promulgated pursuant to the NCUA's Board's exclusive authority as set forth in section 107(5) of the Federal Credit Union Act (12 U.S.C. 1757(5)) to regulate the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit (including credit cards) to members. This exercise of the Board's authority preempts any state law purporting to limit or affect:

(i) (A) Rates of interest and amounts of finance charges, including:

(1) The frequency or the increments by which a variable interest rate may be changed;

(2) The index to which a variable interest rate may be tied;

(3) The manner or timing of notifying the borrower of a change in interest rate;

(4) The authority to increase the interest rate on an existing balance;

(B) Late charges; and

(C) Closing costs, application, origination, or other fees;

(ii) Terms of repayment, including:

(A) The maturity of loans and lines of credit;

(B) The amount, uniformity, and frequency of payments, including the accrual of unpaid interest if payments are insufficient to pay all interest due;

(C) Balloon payments; and

(D) Prepayment limits;

(iii) Conditions related to:

(A) The amount of the loan or line of credit;

(B) The purpose of the loan or line of credit;

(C) The type or amount of security and the relation of the value of the security to the amount of the loan or line of credit;

(D) Eligible borrowers; and

(E) The imposition and enforcement of liens on the shares of borrowers and accommodation parties.

(2) *Matters not preempted.* Except as provided by paragraph (b)(1) of this section, it is not the Board's intent to preempt state laws that do not affect rates, terms of repayment and other conditions described above concerning loans and lines of credit, for example:

(i) Insurance laws;

(ii) Laws related to transfer of and security interests in real and personal property (see, however, paragraph (g)(6) of this section concerning the use and exercise of due-on-sale clauses);

(iii) Conditions related to:

(A) Collection costs and attorneys' fees;

(B) Requirements that consumer lending documents be in "plain language;" and

(C) The circumstances in which a borrower may be declared in default and may cure default.

(3) *Other Federal law.* Except as provided by paragraph (b)(1) of this section, it is not the Board's intent to preempt state laws affecting aspects of credit transactions that are primarily regulated by Federal law other than the Federal Credit Union Act, for example, state laws concerning credit cost disclosure requirements, credit discrimination, credit reporting practices, unfair credit practices, and debt collection practices. Applicability of state law in these instances should be determined pursuant to the preemption standards of the relevant Federal law and regulations.

(4) *Examination and Enforcement.* Except as otherwise agreed by the NCUA Board, the Board retains exclusive examination and administrative enforcement jurisdiction over Federal credit unions. Violations of Federal or applicable state laws related to the lending activities of a Federal credit union should be referred to the appropriate NCUA regional office.

(5) *Definition of State Law.* For purposes of paragraph (b) of this section "state law" means the constitution, laws, regulations and judicial decisions of any state, the District of Columbia, the several territories and possessions of the United States, and the Commonwealth of Puerto Rico.

(c) *General Rules.* (1) *Scope.* The following general rules apply to all loans to members and, where indicated, all lines of credit (including credit cards) to members, except as otherwise provided in the remaining provisions of section 701.21.

(2) *Written policies.* The board of directors of each Federal credit union shall establish written policies for loans and lines of credit consistent with the relevant provisions of the Act, NCUA's regulations, and other applicable laws and regulations.

(3) *Credit application.* Consistent with policies established by the board of directors, the credit committee or loan officer shall ensure that a credit application is kept on file for each borrower supporting the decision to make a loan or establish a line of credit.

(4) *Maturity.* The maturity of a loan to a member may not exceed 12 years. Lines of credit are not subject to a statutory or regulatory maturity limit. Amortization of line of credit balances and the type and amount of security on any line of credit shall be as determined by contract between the Federal credit union and the member/borrower.

(5) *Ten percent limit.* No loan or line of credit advance may be made to any member if such loan or advance would cause that member to be indebted to the Federal credit union upon loans and advances made to the member in an aggregate amount exceeding 10% of the credit union's total unimpaired shares and surplus.

(6) *Early payment.* A member may repay a loan, or outstanding balance on a line of credit, prior to maturity in whole or in part on any business day without penalty.

(7) *Loan interest rates.* (i) *General.* Except when a higher maximum rate is provided for in paragraph (c)(7)(ii) of this section, a Federal credit union may extend credit to its members at rates not to exceed 15 percent per year on the unpaid balance inclusive of all finance charges. Variable rates are permitted on the condition that the effective rate over the term of the loan (or line of credit) does not exceed the maximum permissible rate.

(ii) *Temporary Rates.* (A) *Authorization.* Effective May 12, 1980, a Federal credit union may extend credit to its members at rates not to exceed 21 percent per year on the unpaid balance inclusive of all finance charges. This authority does not abrogate contractual provisions requiring a lower rate.

(B) *Expiration.* After January 15, 1986, or as otherwise ordered by the NCUA Board, the maximum rate on Federal credit union extensions of credit to members shall revert to 15 percent per year. Rates in excess of 15 percent per year (in the discretion of the Federal credit union and as provided in the credit agreement) but not greater than 21 percent per year may be charged on loans and line of credit balances existing before January 26, 1986. Rates in excess of 15 percent per year shall not be charged on line of credit advances made after January 25, 1986.

(8) *Prohibited Fees.* A Federal credit union shall not make any loan or extend any line of credit if, either directly or indirectly, any commission, fee or other compensation is to be received by any of the credit union's directors, officials, committee members or employees, or any immediate family members of such individuals, for procuring or insuring the loan. For purposes of this section "immediate family member" means a spouse, or a child, parent, grandchild, grandparent, brother or sister, or the spouse of any such individual.

(d) *Loans and Lines of Credit to Officials.* (1) *Purpose.* Sections 107(5)(A) (iv) and (v) of the Act require the approval of the board of directors of the Federal credit union in any case where the aggregate of loans to an official and loans on which that official serves as endorser or guarantor exceeds \$10,000 plus pledged shares. This paragraph implements the requirement by establishing procedures for determining whether board of directors's approval is required. The section also prohibits preferential treatment of officials.

(2) *Official.* An "official" is any member of the board of directors, credit committee or supervisory committee.

(3) *Initial approval.* All applications for loans or lines of credit on which an official will be either a direct obligor or an endorser, cosigner or guarantor shall be initially acted upon by either the board of directors, the credit committee or a loan officer, as specified in the Federal credit union's bylaws.

(4) *Board of Directors' Review.* The board of directors shall, in any case review and approve or deny and application on which an official is a direct obligor, or endorser, cosigner or guarantor if the following computation produces a total in excess of \$10,000:

(i) Add:

(A) The amount of the current application.

(B) The outstanding balances of loans, including the used portion of an approved line of credit, extended to or endorsed, cosigned or guaranteed by the official.

(C) The total unused portion of approved lines of credit extended to or endorsed, cosigned or guaranteed by the official.

(ii) From the above total subtract:

(A) The amount of shares pledged by the official on loans or lines of credit extended to or endorsed, cosigned or guaranteed by the official.

(B) The amount of shares to be pledged by the official on the loan or line of credit applied for.

(5) *Nonpreferential Treatment.* The rates, terms and conditions of any loan or line of credit made to an official, or on which an official is an endorser or guarantor, shall not be more favorable than the rates, terms and conditions for comparable loans or lines of credit to any other credit union member.

(e) *Insured, Guaranteed and Advance Commitment Loans.* A loan secured by the insurance or guarantee of, or with an advance commitment to purchase the loan by, the Federal Government, a State government, or any agency of either, may be made for the maturity and under the terms and conditions, including rate of interest, specified in the law, regulations or program under which the insurance, guarantee or commitment is provided.

(f) *15 Year Loans.* Notwithstanding the general 12 year maturity limit on loans to members, a Federal credit union may make loans with maturities of up to 15 years in the case of (1) a loan to finance the purchase of a mobile home if the mobile home will be used as the member-borrower's residence and the loan is secured by a first lien on the mobile home and (2) a second mortgage loan (or a non-purchase money first mortgage loan in the case of a residence on which there is no existing first mortgage) if the loan is secured by a residential dwelling which is the residence of the member-borrower.

(g) *Long-Term Mortgage Loans.* (1) *Authority.* A Federal credit union may make residential real estate loans to members, with maturities of up to 40 years, or such longer period as may be permitted by the NCUA Board on a case-by-case basis, subject to the conditions of this paragraph.

(2) *Statutory Limits.* The loan shall be made on a one to four family dwelling that is or will be the principal residence of the member-borrower and the loan shall be secured by a perfected first lien in favor of the credit union on such dwelling (or a perfected first security interest in the case of either a residential cooperative or a leasehold or ground rent estate).

(3) *Loan Application.* The loan application shall be a completed standard Federal Housing Administration, Veterans Administration, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association or Federal Home Loan Mortgage Corporation/Federal National Mortgage Association application form. In lieu of use of a standard application the Federal credit union may have a current attorney's opinion on file stating that the forms in use meet the requirements of applicable Federal, state and local laws.

(4) *Security Instrument and Note.* The security instrument and note shall be executed on the most current version of the FHA, VA, FHLMC, FNMA, or FHLMC/FNMA Uniform Instruments for the jurisdiction in which the property is located. No prepayment penalty shall be allowed, although a Federal credit union may require that any partial prepayments be made on the date monthly installments are due and be in the amount of that part of one or more monthly installments that would be applicable to principal. In lieu of use of a standard security instrument and note, the Federal credit union may have a current attorney's opinion on file stating that the security instrument and note in use meet the requirements of applicable Federal, state and local laws.

(5) *First Lien, Territorial Limits.* The loan shall be secured by a perfected first lien or first security interest in favor of the credit union supported by a properly executed and recorded security instrument. No loan shall be secured by a residence located outside the United States of America, its territories and possessions, or the Commonwealth of Puerto Rico.

(6) *Due-On-Sale Clauses.* (i) Except as otherwise provided herein, the exercise of a due-on-sale clause by a Federal credit union is governed exclusively by section 341 of Public Law 97-320 and by any regulations issued by the Federal Home Loan Bank Board implementing section 341.

(ii) In the case of a contract involving a long-term (greater than twelve years), fixed rate first mortgage loan which was made or assumed, including a transfer of the lien property subject to the loan, during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such state has rendered a decision (or if the highest court has not so decided, the date on which the next highest court has rendered a decision resulting in a final judgment if such decision applies statewide) prohibiting such exercise, and ending on October 15, 1982, a Federal credit union may exercise a due-on-sale clause in the case of a transfer which occurs on or after November 18, 1982, unless exercise of the due-on-sale clause would be based on any of the following:

(A) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(B) The creation of a purchase money security interest for household appliances;

(C) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(D) The granting of a leasehold interest of 3 years or less not containing an option to purchase;

(E) A transfer to a relative resulting from the death of a borrower;

(F) A transfer where the spouse or children of the borrower become an owner of the property;

(G) A transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(H) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or

(I) Any other transfer or disposition described in regulations promulgated by the Federal Home Loan Bank Board.

§§ 701.21-1 through 701.21-6B [Removed]

2. Sections 701.21-1 through 701.21-6B are removed.

§§ 701.22 and 701.23 [Redesignated from §§ 701.21-7 and 701.21-8]

3. Existing §§ 701.21-7 and 701.21-8 are redesignated as §§ 701.22 and 701.23, respectively.

§ 701.22 [Amended]

4. Redesignated § 701.22 is amended by removing paragraph (b)(3) and redesignating paragraph (b)(4) as new paragraph (b)(3).

§ 701.23 [Amended]

4. Redesignated § 701.23 is amended by removing the reference in § 701.23(b)(1)(iv) to "section 701.21-6" and inserting in lieu thereof "section 701.21(g)", and by removing the last sentence of section 701.23(b)(1)(iv).
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